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Supreme Court, U.S.
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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INEXCO OIL COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY AND JOHN S. HERRINGTON, SECRETARY OF ENERGY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Temporary Emergency Court of Appeals may assume jurisdiction of a petition for a writ of mandamus to review a discovery order even though it would have no jurisdiction under *Bray v. United States*, 423 U.S. 73 (1975) (per curiam), to review such an order in a criminal contempt proceeding.

2. Whether the Temporary Emergency Court of Appeals has misapplied the doctrine of *res judicata* by holding that a previous judicial approval of an agency's interpretation of a regulation, based upon the substantial evidence in that case, precludes non-parties from subsequently attacking the agency's interpretation of the regulation on the basis of a different administrative record.

LIST OF PARTIES IN THE TEMPORARY EMERGENCY COURT OF APPEALS

The following is a full and complete list of the parties before the Temporary Emergency Court of Appeals in this action:

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United States Department of Energy	1000 Independence Ave., S.W. Washington, D.C. 20585
John S. Herrington, Secretary Department of Energy	1000 Independence Ave., S.W. Washington, D.C. 20585
The Honorable Clarence A. Brimmer, Chief Judge of the United States District Court for the District of Wyoming	P.O. Box 985 Cheyenne, Wy. 82001

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties in the Temporary Emergency Court of Appeals	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutes and Regulations Involved	2
Statement of the Case	3
Summary of Argument	4
Reasons for Granting the Writ	5
A. The Temporary Emergency Court of Appeals May Not Assume Jurisdiction To Review a Discovery Order by Writ of Mandamus When It Would Have No Jurisdiction Under *Bray* v. *United States* To Review Such an Order in a Criminal Contempt Proceeding	5
B. The Temporary Emergency Court of Appeals Misapplied the Doctrine of *Res Judicata* by Holding that a Previous Judicial Approval of an Agency's Interpretation of a Regulation, Based Upon the Substantial Evidence in that Case, Precludes Non-Parties from Subsequently Attacking the Agency's Interpretation of the Regulation on the Basis of a Different Administrative Record	12
Conclusion	15

TABLE OF AUTHORITIES

Cases

	Page
Allied Chemical Corp. v. *Daiflon, Inc.*, 499 U.S. 33 (1980) (per curiam)	10
Atlantic Richfield Co. v. *DOE*, 769 F.2d 771 (D.C. Cir. 1984)	10
Belfer v. *Pence*, 435 F.2d 121 (9th Cir. 1970) (per curiam)	9
Bray v. *United States*, 423 U.S. 73 (1975) (per curiam)	*passim*
DOE v. *Brett*, 659 F.2d 154 (TECA 1981) (per curiam), *cert. denied*, 456 U.S. 936 (1982)	10
DOE v. *Crocker*, 629 F.2d 1341 (TECA 1980) (per curiam)	10
DOE v. *Osborn*, 760 F.2d 282 (TECA 1984)	13,14
EPA v. *Mink*, 410 U.S. 73 (1973)	11
Grigsby v. *DOE*, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979)	13,14
Kerr v. *United States District Court*, 426 U.S. 394 (1976)	9
Maresse v. *American Academy of Orthopaedic Surgeons*, 726 F.2d 1150 (7th Cir. 1984) (en banc), *rev'd, cert. denied*, 105 S. Ct. 1327 (1985)	9
Mountain Fuel Supply Co. v. *DOE*, 656 F.2d 690 (TECA 1981)	13,14
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975)	11
P&R Trading Co., Dkt. No. R085-20-000 (FERC Sept. 23, 1985)	14
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979)	13,14
Renegotiation Board v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1941)	11
Sector Refining, Inc. v. *Enterprise Refining Co.*, 771 F.2d 496 (TECA 1985)	6
Texaco Inc. v. *DOE*, 616 F.2d 1193 (TECA 1979)	10
United States v. *Texas Energy Petroleum Corp.*, 719 F.2d 394 (TECA 1983)	8
United States v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982)	10,11
Will v. *Calvert Fire Ins. Co.*, 437 U.S. 655 (1978)	10
Will v. *United States*, 389 U.S. 90 (1967)	10

Statutes

	Page
Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note	2,4,7,10
Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § § 751 *et seq.*	2,4,7,10,12
All Writs Act, 28 U.S.C. § 1651	3
Freedom of Information Act, 5 U.S.C. § § 552 *et seq.*	8

Miscellaneous

4 K. Davis, *Administrative Law Treatise* § 21:2 (1983)	14
8 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2006 (1970 & Supp. 1985)	9
Rule 26, Federal Rules of Civil Procedure	12

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I.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals ("TECA") granting the petition for a writ of mandamus has not yet been reported. It appears in Appendix A. The order of the United States District Court for the District of Wyoming compelling the production of discovery documents is an unpublished order. It appears in Appendix B.

JURISDICTION

The Temporary Emergency Court of Appeals did not have subject-matter jurisdiction of this proceeding. It nonetheless entered judgment on October 2, 1985, and denied a petition for rehearing and a suggestion for rehearing en banc on November 1, 1985. This Court has jurisdiction under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a)(1).

III.

STATUTES AND REGULATIONS INVOLVED

Section 211(b)(2) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, provides:

> (2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a)(1), provides:

> (a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212 (b)) and 213 of such Act shall apply to functions under this chapter to the same

extent such sections apply to functions under the Economic Stabilization Act of 1970.

The All Writs Act, 28 U.S.C. § 1651, provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

IV.

STATEMENT OF THE CASE

This case presents important questions with respect to federal appellate jurisdiction and administrative law. The first question involves the relationship between TECA and the courts of appeals for the various circuits. TECA has, by using the extraordinary writ of mandamus, purported to expand the scope of its statutorily limited jurisdiction to review a district court's interlocutory discovery decision. If TECA's decision is correct, parties in future cases will be able to obtain review in TECA of decisions that this Court has held should be reviewed in a circuit court of appeals, by simply seeking a writ of mandamus.

The second issue involves a dangerous misapplication of the doctrine of *res judicata* in the area of administrative law. In the opinion below, TECA has held that prior judicial decisions reviewing the interpretations of an agency's regulations which involved distinct parties and unique administrative records are binding on subsequent unrelated parties with different administrative records. This is a fundamental misapprehension of the principles of administrative law which permit each party to question an agency action in its own unique circumstances. TECA's decision below, if upheld, would grant the agency's adjudication the same binding effect as a general rulemaking proceeding, even on a party who could not have participated in the adjudicatory proceeding.

The Department of Energy ("DOE")[1] has accused Inexco Oil Company ("Inexco") of charging illegal prices for crude oil. Inexco has contested DOE's findings at each stage of the administrative-review process and has now challenged the final administrative action in the United States District Court for the District of Wyoming. The Honorable Clarence A. Brimmer, Chief Judge of the United States District Court for the District of Wyoming, ordered DOE to produce 63 documents that are, in his judgment, relevant to Inexco's judicial challenge of the administrative action. TECA issued a writ of mandamus requiring Judge Brimmer to vacate his discovery order.

V.

SUMMARY OF ARGUMENT

TECA does not have subject-matter jurisdiction of a petition for mandamus seeking interlocutory review of discretionary discovery decisions made by a trial court under the Federal Rules of Civil Procedure. TECA's jurisdiction is limited to review of issues arising under the Economic Stabilization Act of 1970 ("ESA") or the Emergency Petroleum Allocation Act of 1973 ("EPAA"). Under this Court's decision in *Bray* v. *United States*, 423 U.S. 73 (1975) (per curiam), TECA does not have jurisdiction here because this mandamus proceeding, which arises solely under the discovery provisions of the Federal Rules of Civil Procedure, will not require the interpretation of any substantive provisions of the ESA, the EPAA or regulations promulgated thereunder.

TECA has attempted to avoid *Bray* by noting that here DOE sought appellate review by mandamus rather than by direct appeal of a final contempt conviction. This Court must rebuff any such attempt to limit *Bray* to contempt proceedings. Under either avenue of review, the court of appeals may examine the propriety of the underlying enforcement order. If mandamus may be sought in TECA, but a criminal contempt conviction is

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[1] As used herein, the term "DOE" shall refer to the current Department of Energy and all of its predecessors, including the Cost of Living Council, the Federal Energy Office, and the Federal Energy Administration.

reviewable only in the circuit court of appeals, a party in a district court proceeding may choose the forum in which to obtain review. In direct conflict with *Bray*, the opinion below would permit a party in a proceeding arising under the Criminal Code to obtain review in TECA, by mandamus, of interlocutory decisions by the district court on issues that only peripherally concern the EPAA or the DOE regulations.

Assuming *arguendo* that TECA had jurisdiction of the mandamus proceeding below, TECA erred fundamentally in holding that its prior decisions foreclose Inexco's suit even before the discovery phase. Due process prohibits a judgment from binding a subsequent litigant who was not a party or privy to the previous decision. The rule holds equally true in an administrative adjudicatory proceeding because judicial review of an agency adjudication is based upon the substantial evidence compiled in the administrative record. Inexco has contended in the district court that, based upon the admittedly more extensive facts and issues contained in Inexco's record, DOE's application to Inexco of the term "posted price" was arbitrary and capricious and not supported by substantial evidence. A court of appeals cannot lawfully decide that issue as a question of law by reference solely to the facts and contentions in different administrative records involving different parties. To do so is to convert an administrative adjudication regarding limited issues, facts and parties into a generally applicable rulemaking proceeding without providing the affected parties the requisite notice and opportunity to participate.

VI.

REASONS FOR GRANTING THE WRIT

A. The Temporary Emergency Court of Appeals May Not Assume Jurisdiction To Review a Discovery Order by Writ of Mandamus When It Would Have No Jurisdiction Under *Bray* v. *United States* To Review Such an Order in a Criminal Contempt Proceeding.

The allocation of jurisdiction between TECA and the courts of appeals for the various circuits presents an important question which this Court has not addressed since *Bray* v. *United States*, 423 U.S. 73 (1975) (per curiam). The courts of appeals have

directed a considerable amount of their scarce resources to the threshold question of TECA's jurisdiction under the ESA or the EPAA. For example, in the recent decision in *Sector Refining, Inc.* v. *Enterprise Refining Co.*, 771 F.2d 496, 502 (TECA 1985), TECA noted that " '[a]pproximately thirty percent of TECA's cases are decided upon jurisdictional grounds.' " This case presents this Court an opportunity to resolve the confusion created by the courts of appeals since *Bray*.

The legality of the prices charged by Inexco, as a seller, turns on whether the offers to purchase crude oil made by Inexco's purchasing division, Inexco Oil Marketers, constituted the highest "posted prices" in various fields of Wyoming's Powder River Basin on May 15, 1973, within the meaning of applicable DOE regulations. In essence, Inexco's position in the district court is twofold: (1) DOE's interpretation of the term "posted price" in this and other cases is arbitrary and capricious and is not entitled to judicial deference because, *inter alia*, it conflicts with the agency's contemporaneous construction of the term, and (2) even if DOE's interpretation is valid in the abstract, the administrative record in this case does not contain substantial evidence to support DOE's application of that interpretation to the unique facts of Inexco's case.

Inexco sought discovery in the district court of documents relevant to both the interpretation and application of the term "posted price." DOE argued initially that discovery was completely unavailable because judicial review is limited to the administrative record compiled by the agency. Judge Brimmer, however, concluded that Inexco was entitled to discovery to determine whether the administrative record was complete and whether DOE's current interpretation and application of the term "posted price" conflict with DOE's contemporaneous construction of the term. After initially protesting that all responsive documents had been supplied to Inexco, DOE identified 228 additional documents, but refused to produce 63 of them on the basis of the pre-decisional, deliberative-process privilege.

Following DOE's refusal to produce the documents, Judge Brimmer conducted an *in camera* review and, in a comprehensive, 36-page order which discusses each document, determined

that all 63 of the documents are discoverable and should be produced. His decision with respect to each document is based on one or more of three considerations: (1) DOE did not provide enough information for the court to determine whether the privilege applies; (2) the document is not both pre-decisional and deliberative in nature; or (3) Inexco's need for the document outweighs DOE's interest in preventing disclosure. App. B; *see* App. C. Each of these determinations resulted from an interpretation of the deliberative-process privilege and the discovery provisions of the Federal Rules of Civil Procedure, not the EPAA or its implementing regulations. To protect the confidentiality of the documents, Judge Brimmer prohibited Inexco from duplicating the documents, disclosing them to third parties, or using them for any purpose other than the trial in this matter. App. B at B-21.

DOE sought a writ of mandamus from TECA requiring Judge Brimmer to vacate his discovery order. On October 2, 1985, TECA issued an opinion granting DOE's petition for a writ of mandamus. The court rejected Inexco's argument that TECA lacked jurisdiction, holding that

> where a claim of qualified privilege is overruled on the grounds that the requestor's need for the discovery outweighs the opponent's interest in non-disclosure, and where the finding of need is based on a conclusion that the discovery sought is material to establish a claim or defense under the EPAA . . . , that legal conclusion involves the adjudication of an EPAA issue . . . .

App. A at A-5. TECA found that this Court's decision in *Bray* was "inapposite" because DOE did not here seek review of a criminal contempt conviction. *Id.* at A-6. TECA stated that

> [t]he short opinion in *Bray* apparently did not contemplate that the decision to enforce the subpoena might itself involve the adjudication of an ESA issue, or that the invalidity of the district court's enforcement order under the ESA might be raised on appeal of the criminal contempt conviction as a defense.

Id.

In *Bray*, the appellant disobeyed a district court's order to produce documents sought by the government in an investigation of possible violations of the ESA. The appellant was then held in criminal contempt. He appealed the contempt conviction to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit dismissed the appeal for want of jurisdiction on the ground that the case "arose under" the ESA. This Court concluded that the appeal did not "arise under" the ESA and that the Tenth Circuit, not TECA, had jurisdiction:

> The [ESA] does not contain any provision prohibiting the violation of a district court's enforcement order or establishing penalties for such a violation. Thus, rather than "arising under" any provision of the [ESA], the contempt prosecution was commenced under 18 U.S.C. § 401, the provision of the Criminal Code that empowers federal courts to punish certain contempts of their authority.... Review in the TECA of criminal contempt convictions relating to compliance investigations or enforcement efforts is not necessary to assure uniform interpretation of the substantive provisions of the stabilization scheme. Indeed, a requirement of such review would only serve to undermine the prompt resolution of Stabilization Act questions by burdening the TECA with additional appeals.

423 U.S. at 75.

TECA itself has recognized that TECA does not have jurisdiction of appeals relating to an analogous question regarding the production of documents. In *United States v. Texas Energy Petroleum Corp.*, 719 F.2d 394 (TECA 1983), DOE was seeking to enforce subpoenas it had issued to Texas Energy under, *inter alia*, the EPAA. The district court held that the subpoenas were enforceable but stayed enforcement pending resolution of Texas Energy's counterclaim seeking enforcement of document requests that Texas Energy had made under the Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552 *et seq.* DOE appealed to TECA, which declared that it would not have jurisdiction to review an order by the district court concerning Texas Energy's FOIA requests:

> Appellate jurisdiction of the FOIA counterclaim would be within the jurisdiction of the Fifth Circuit Court of Appeals. The issues raised by the FOIA counterclaim appear only to involve the application of that statute; construction and application of the [EPAA or ESA] will not be required. . . .

Id. at 398 (citations omitted).

The only appreciable distinction between *Bray* and this case is the procedural vehicle used to move from the district court to interlocutory appellate review of orders relating to the production of documents. Mandamus, the vehicle chosen by DOE, has traditionally been disfavored as a means of obtaining review of interlocutory orders compelling the production of documents. *See, e.g., Kerr v. United States District Court*, 426 U.S. 394 (1976); *Belfer v. Pence*, 435 F.2d 121, 123 (9th Cir. 1970) (per curiam). Rather, aggrieved parties have generally been required to follow the path of review chosen by the petitioner in *Bray*: appeal of a criminal contempt conviction following disobedience of the order to produce the documents. If DOE had not chosen the mandamus vehicle, but had refused to produce the documents, *Bray* undeniably would have required review in the United States Court of Appeals for the Tenth Circuit. DOE's selection of a disfavored avenue of review should not be permitted to expand TECA's limited jurisdiction.

TECA's attempt to distinguish *Bray* on the ground that the appellant there sought review by appealing a criminal contempt conviction, rather than by petitioning for a writ of mandamus, elevates form over substance. The issue on direct appeal from a contempt conviction, at least where the underlying production order was not otherwise reviewable, is whether the district court properly ordered the production of the documents. *See Maresse v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1152, 1156-58 (7th Cir. 1984) (en banc), *rev'd on another issue, cert. denied on this issue*, 105 S.Ct. 1327, 1335 (1985); *see also* 8 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2006 at 34 & n.85 (1975 & Supp. 1985). Indeed, TECA's opinion in this case recognizes that the appellant in *Bray* properly could have raised (and the appellate court properly could have considered) argument concerning the validity of the underlying

subpoena enforcement order, App. A at A-6, just as TECA considered the propriety of Judge Brimmer's discovery order. The issue in a mandamus proceeding challenging a discovery order, on the other hand, is whether the district court exceeded the considerable bounds of its discretion in ordering the production of the requested documents. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (per curiam); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978); *Will v. United States*, 389 U.S. 90 (1967). Because a court of appeals on a petition for a writ of mandamus cannot go behind a district court's discretionary decisions, its review of an interlocutory discovery decision is necessarily less searching than its review of a criminal contempt conviction based on the failure to produce documents. If a case like *Bray* does not present an ESA or an EPAA issue, this case, *a fortiori*, does not either. The mandamus exception that TECA has carved out for itself, therefore, makes little sense.[2]

The courts of appeals have held since *Bray* that TECA's jurisdiction is limited to review of issues arising under the ESA or the EPAA or regulations promulgated thereunder. *E.g., Texaco Inc. v. DOE*, 616 F.2d 1193, 1196-98 (TECA 1979). An issue "arises under" the ESA or the EPAA only if it "involve[s] the construction, applicability or effect" of either of those statutes or the regulations promulgated thereunder. *Atlantic Richfield Co. v. DOE*, 769 F.2d 771, 778-80 (D.C. Cir. 1984).

The primary basis for the Court's holding in *Bray* is that "[r]eview in the TECA of [matters relating to the production of documents] is not necessary to assure uniform interpretation of the substantive provisions of the [ESA or the EPAA]." 423 U.S. at 75; *see United States v. Uni Oil, Inc.*, 646 F.2d 946, 950-51 (5th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982). Where the EPAA or the ESA is only peripherally involved, TECA does not

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[2] TECA cited only two opinions in support of its decision to sidestep *Bray* and take jurisdiction of this case. *DOE v. Brett*, 659 F.2d 154 (TECA 1981) (per curiam), *cert. denied*, 456 U.S. 936 (1982); and *DOE v. Crocker*, 629 F.2d 1341 (TECA 1980) (per curiam). Both *Brett* and *Crocker* were rendered after *Bray*, but neither opinion cited or discussed *Bray*. TECA did not expressly address the question of its jurisdiction in *Brett*. In *Crocker*, TECA did address its jurisdiction, but it did not discuss *Bray*.

have jurisdiction. *United States v. Uni Oil*, 646 F.2d at 950. A review of the district court's order here makes clear that it did not decide a single substantive issue under the EPAA, and that the EPAA is at most only peripherally involved.

The district court's decisions with respect to each document relate solely to the deliberative-process privilege. Whether a document is truly deliberative in nature, for example, is determined by neutral principles established in case law construing the discovery provisions of the Federal Rules of Civil Procedure. *See, e.g., EPA v. Mink*, 410 U.S. 73 (1973); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975). These principles apply equally to EPAA and non-EPAA cases. Their application in this case required no interpretation of the substantive provisions of the ESA, the EPAA or regulations promulgated thereunder. Obviously, there is no need, for the sake of uniformity, to vest TECA with jurisdiction of this case or any other case involving only the deliberative-process privilege.

TECA's decision is not only logically flawed. The mandamus exception that it creates is also potentially insidious. If TECA's decision is upheld, appellate jurisdiction of discovery disputes and other interlocutory orders will turn on the procedural vehicle chosen to obtain review. The mischief to which this device is susceptible is manifest. Forum shopping is disdained at the trial level and should likewise be condemned at the appellate level. If TECA's view prevails, a litigant in a criminal case like *Uni* could seek mandamus of a district court's interlocutory order excluding evidence on the basis of relevancy to an EPAA issue and thereby vest the TECA rather than the appropriate appellate court with exclusive jurisdiction. The decision below could lead to disparate discovery or evidentiary standards within the same circuit: one standard developed by the appropriate federal appellate court for the majority of cases and a different standard developed by TECA in cases such as this which peripherally involve EPAA issues. Moreover, it would be the disappointed litigant itself who could determine which appellate court had jurisdiction by seeking mandamus as opposed to more traditional methods of review.

The only other possible distinction between this case and *Bray* is that the federal government rather than a private litigant sought review in TECA. This will often be the case given the prominent role that DOE plays in the EPAA regulatory scheme; however, just as the method of seeking appellate review should not dictate the proper forum, neither should the identity of the litigant.

B. The Temporary Emergency Court of Appeals Misapplied the Doctrine of *Res Judicata* by Holding that a Previous Judicial Approval of an Agency's Interpretation of a Regulation, Based Upon The Substantial Evidence in that Case, Precludes Non-Parties from Subsequently Attacking the Agency's Interpretation of the Regulation on the Basis of a Different Administrative Record.

On the merits of the petition for mandamus, TECA determined that the requested documents are not discoverable because they are irrelevant as a matter of law. This conclusion is based on the premise that prior judicial approval of DOE's interpretation of the term "posted price," although it was based on different administrative and judicial records compiled by different parties, precludes Inexco from bringing forward evidence of agency impropriety that would undermine the validity of that interpretation.

TECA's decision ignores fundamental notions of due process and threatens to undermine accepted standards for judicial review of administrative adjudications. Thus, even if it had jurisdiction of this mandamus proceeding, TECA's decision presents an important question that deserves this Court's attention.

TECA expressed its holding on the merits in varying terms. According to TECA, the requested documents are either "irrelevant to any proper issue before the district court for resolution," App. A at A-7, or "not material to any proper issue in the district court," *id.* at A-8.[3] These conclusions are based on the remarkable proposition that "Inexco may not put in issue below the validity of the DOE's current interpretation of the posted price

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[3] Compare Fed. R. Civ. P. 26 (permitting "discovery regarding any matter, not privileged, which is relevant to the *subject matter* involved in the pending action") (emphasis supplied).

term, nor may it urge that its interpretation is not due judicial deference." *Id.*

TECA relied upon two subsidiary propositions in determining that Inexco may not challenge DOE's interpretation of the term "posted price": (1) Inexco's principal argument is that "DOE's interpretation of the 'posted price' definition urged below was inconsistent with its 'contemporaneous construction' of that term, and therefore, was either invalid or not entitled to judicial deference," App. A at A-7, and (2) TECA has already determined, in three prior opinions to which Inexco was not a party,[4] that DOE's interpretation of the term "posted price" is "not infirm on either due process or contemporaneous construction grounds" — a determination which TECA held to be "binding on the district courts until it is either reversed or overruled." *Id.* at A-7, A-8.

The first of these subsidiary propositions is simply wrong as a matter of fact. Inexco's attack in the district court is *not* based principally on the argument that DOE's interpretation of the term "posted price" is invalid. Inexco has argued with equal force that, assuming that DOE's *interpretation* of the term is valid, DOE's *application* of that interpretation to Inexco's unique situation is not supported by substantial evidence. *See* Inexco's Verified Complaint at 10-11. Until this case, TECA has recognized the distinction between these two arguments. *See, e.g., Osborn*, 760 F.2d at 284-85.

In any event, TECA's second subsidiary proposition — that Inexco is foreclosed by *Osborn*, *Mountain Fuel*, and *Grigsby* from arguing that DOE's interpretation of the term "posted price" is invalid — is wrong as a matter of law. By so holding, TECA has lost sight of the fundamental precept that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 n.7 (1979). TECA has, in effect, given *res judicata* effect to *Grigsby*, *Osborn*, and *Mountain Fuel*. It is clear beyond peradventure,

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[4] *See DOE v. Osborn*, 760 F.2d 282 (TECA 1984); *Mountain Fuel Supply Co. v. DOE*, 656 F.2d 690 (TECA 1981); *Grigsby v. DOE*, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979).

however, that collateral estoppel and *res judicata* do not apply to non-parties such as Inexco. *Parklane Hosiery*, 439 U.S. at 327.

Inexco concedes that *Grigsby*, *Osborn*, and *Mountain Fuel* have *stare decisis* effect on the questions of law there decided. A decision that an agency interpretation of a regulation is valid, however, depends in part on the *factual* question of how the agency and its employees have applied the regulation, especially where the attack, as in this case, is that the agency's proffered interpretation conflicts with the agency's contemporaneous construction. A court's decision with respect to an attack like this necessarily will be based in significant part on the peculiar facts adduced by the litigants. A court's decision might change, for example, if another party attacking the agency's interpretation were able to show, as a factual matter, that top agency officials had applied the regulation at issue in an erratic and inconsistent manner.

Inexco was not a party to *Grigsby*, *Osborn*, or *Mountain Fuel*. Indeed, under FERC rules of intervention, Inexco could not have been a party to those proceedings. *See P&R Trading Co.*, Dkt. No. R085-20-000 (FERC Sept. 23, 1985).[5] Inexco, therefore, has never had a chance to prove that DOE's current interpretation of the term "posted price" conflicts with DOE's contemporaneous construction. TECA has held, in effect, that Inexco is bound by the inability of other parties to adduce the facts necessary to prove their respective cases. This is a novel and dangerous holding. While *res judicata* has traditionally been applied in the administrative context, it has always been applied with its identity-of-parties requirement intact. *See* 4 K. Davis, *Administrative Law Treatise* § 21:2 (1983). TECA would abrogate that requirement and would deprive Inexco of its own chance to prove that DOE has been erratic and inconsistent. The requested documents, as Judge Brimmer was well aware, are relevant on this point.[6] The effect of such a holding, of course, is to give individual adjudicatory decisions by agencies the force of full-blown agency rules

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[5] A copy of *P&R Trading Co.* has been lodged with the Court.

[6] *See* Letter of Judge Brimmer to TECA, attached hereto as Appendix C.

without the statutorily mandated opportunity for notice and comment.

TECA said in the opinion below that "Inexco's campaign against DOE's current interpretation of the 'posted price' term has been previously fought, and lost." App. A at A-7. Inexco, however, was not on that battlefield. Remarkably, TECA would forever deny Inexco the opportunity to wage its own campaign.

VII.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

By .....

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CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served with a copy of the foregoing document have been served. A copy of the foregoing document was mailed postage prepaid by first class mail to each of the following:

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The Honorable Clarence A. Brimmer
Chief Judge of the United States District Court
for the District of Wyoming
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APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 10-60

THE UNITED STATES DEPARTMENT OF ENERGY and
JOHN S. HERRINGTON, Secretary of Energy,
PETITIONERS,

v.

THE HONORABLE CLARENCE A. BRIMMER,
Chief Judge
of the United States District Court for the
District of Wyoming, and INEXCO OIL COMPANY,
RESPONDENTS.

Petition For Issuance of a Writ of Mandamus to the
United States District Court
for the District of Wyoming

(C-83-0513)

(Argued: April 17, 1985 Decided: October 2, 1985)

THOMAS C. NEWKIRK, United States Department of Energy, argued with whom on the brief were Larry P. Ellsworth, Charles L. Cope and Rodney L. Solenberger, Washington, D.C., for Petitioners.

ROGER A. RIDER, of Mayor, Day & Caldwell, argued with whom on the brief were Ronald J. Bigelow and Charles E. Suffling of the same firm, Houston, Texas, and Stanley K. Hathaway, John B. Speight and Richard J. Barrett, Hathaway, Speight and Kunz, Cheyenne, Wyoming, for Respondent, Inexco Oil Company.

Before: CHRISTENSEN, JAMESON and MACBRIDE, Judges.

MACBRIDE, Judge:

The petitioners, the United States Department of Energy and the Secretary of Energy (collectively, "DOE"), seek a writ of

mandamus directing the respondent district court judge to vacate a discovery order entered in litigation between DOE and the respondent Inexco Oil Company ("Inexco"), which required DOE to produce 63 internal government documents DOE claimed to be privileged. On February 4, 1985, we granted a stay of that order pending disposition of the petition. We now conclude that the requested documents are irrelevant to any issue properly before the district court, and accordingly order that the writ of mandamus issue.

BACKGROUND

The lengthy history of this case is here briefly summarized. In 1979, the Southwest Enforcement District of the Economic Regulatory Administration ("ERA"), an enforcement arm of the Department of Energy, issued a Proposed Remedial Order ("PRO") alleging that in violation of then effective regulations, Inexco had overcharged its customers during the period from September 1973 through December 1975 for "old" crude oil produced at certain of its fields in the Powder River Basin in the State of Wyoming. The effective regulations set the ceiling price for "old" crude oil at the sum of "the highest posted price of that grade of crude oil at that field" on May 15, 1973, and a specified premium. 10 C.F.R. § 212.73(b) (1974). The PRO alleged that Inexco had improperly calculated the applicable ceiling price for its "old" crude by recognizing its own 1973 contract prices as the "highest posted price" in its ceiling price calculations. The PRO alleged that a lower price, appearing in price bulletins of Mobil, Amoco, and Conoco, constituted the appropriate "highest posted price." Accordingly, the PRO alleged that Inexco had been charging its customers in excess of the maximum legal price, and proposed that Inexco be ordered to refund overcharges of nearly $100,000.00 plus interest.

Inexco challenged the PRO in the Office of Hearings and Appeals ("OHA"), the adjudicative agency within the Department of Energy. Before the OHA, Inexco sought an order compelling DOE to produce precisely the same type of documents sought in the district court: internal governmental and other documents construing the regulatory "posted price" term,

both in general terms and as applied to Inexco's circumstances. Inexco's discovery request was denied, on the grounds that the requested discovery was irrelevant to the proceedings, since the validity and correct construction of the "posted price" term had previously been authoritatively established. *Inexco Oil Co.*, 6 DOE P 82,581 at 85,248-85,252 (1980) (OHA order denying discovery). The OHA subsequently affirmed the PRO. *Inexco Oil Co.*, 7 DOE P 83,015 (1981).

Inexco appealed the latter OHA decision to the Federal Energy Regulatory Commission ("FERC"). Inexco initially declined to request discovery in preparation for proceedings before FERC, and when later it moved to discover much the same documents sought in the OHA proceedings, its motion was denied as presented too late. *Inexco Oil Co.*, 18 FERC P 62,476 (1982) (presiding officer's order denying discovery). After argument and briefing, FERC upheld the OHA decision. *Inexco Oil Co.*, 25 FERC P 61,146, *supplemented*, 25 FERC P 61,411, *affirming* 25 FERC P 62,354 (presiding officer's proposed order) (1983).

Inexco thereupon sought review of the FERC decision in the United States District Court for the District of Wyoming. *Inexco Oil Co. v. United States Dep't of Energy*, No. C-83-0513 (D. Wyo. filed December 23, 1983). In that court, Inexco sought to compel DOE to produce essentially the same sort of documents previously sought before the OHA and FERC, namely, documents showing internal DOE memoranda discussing or applying the "posted price" term, and internal memoranda pertaining to DOE's application of that regulation to Inexco's circumstances. DOE resisted all discovery, relying on its argument that review of the administrative action must be confined to the record before the administrative decision-maker. DOE's position was overruled by the presiding magistrate, and DOE was ordered to produce the requested documents. DOE produced 165 documents, but ultimately claimed the governmental deliberations privilege as to 63 documents. Inexco thereupon sought an order compelling discovery. The presiding magistrate granted the order.

On appeal of the magistrate's ruling to the respondent district judge, the court conducted an *in camera* review of all the documents in question and determined that all of them should be

produced. As to four of the documents, the court concluded that they should have been included in the administrative record. As to each of the other 59 documents, the court made an individualized decision either that the governmental deliberations privilege did not apply to the document, or that if the privilege applied, Inexco's need outweighed the petitioners interest in non-disclosure. The court ordered disclosure conditioned by a limited protective order which forbade Inexco from communicating the documents to any other party.

Petitioners thereupon filed this petition for writ of mandamus seeking vacation of the contested discovery order. We ordered a stay of the district court's order pending our disposition of this petition.

DISCUSSION

Inexco contends that (1) this court lacks jurisdiction over the issues raised by this petition; (2) the district court did not abuse its discretion in ordering production of the disputed documents, and (3) even if the district court's order was error, mandamus does not lie to correct it. We address these points in order.

JURISDICTION

The Temporary Emergency Court of Appeals ("TECA") is a court of special and narrowly limited jurisdiction. *MGPC, Inc. v. Dep't of Energy*, 673 F.2d 1277, 1280 (TECA 1982). With respect to the circumstances of this case, our jurisdiction extends only to the determination of issues arising under the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 751 *et seq.*, and the regulations promulgated pursuant to its authority, which issues were actually adjudicated in the district court. Inexco's jurisdictional argument has two, somewhat related, prongs. Inexco first asserts that the district court's discovery and privilege decisions did not adjudicate any EPAA issue. We reject that contention. Discovery is appropriate only where the material sought is "relevant to the subject-matter of the litigation." Fed. R. Civ. Proc. 26(b)(1). Where a district court's finding of relevance is grounded on the production request's materiality to

an issue of law arising under the EPAA, that decision necessarily involves an adjudication of an EPAA issue. *See United States Dep't of Energy v. Crocker*, 629 F.2d 1341, 1344 (TECA 1980) (per curiam). Likewise, where a claim of qualified privilege is overruled on the grounds that the requestor's need for the discovery outweighs the opponent's interest in non-disclosure, and where the finding of need is based on a conclusion that the discovery sought is material to establishing a claim or defense under the EPAA or its appurtenant regulations, that legal conclusion involves the adjudication of an EPAA issue, and as such is subject to our appellate authority.

In this case, as is more fully discussed below, it appears that the district court concluded that the requested documents were relevant to determining the validity of, or the correct interpretation and application of DOE's regulations, promulgated under the authority of the EPAA, defining the disputed "posted price" term. Under the legal standards described above, that conclusion of relevance to a claim or defense relating to the validity, construction, or application of an EPAA-authorized regulation represents the decision of an EPAA issue, and hence is properly placed before us for review.

Second, Inexco argues that, even if the district court's discovery and privilege decisions pose EPAA issues within TECA's competence, we nonetheless lack subject-matter jurisdiction under the Supreme Court's decision in *Bray v. United States*, 423 U.S. 73 (1975). In *Bray*, the Internal Revenue Service, which then had enforcement authority under the Economic Stabilization Act ("ESA"), subpoenaed certain documents from Bray to further an investigation into possible violations of the ESA. When Bray failed to comply, the district court granted the IRS's petition for an enforcement order, and when Bray disobeyed that order, the court convicted him of criminal contempt under 18 U.S.C. § 401. Bray appealed his conviction to the Court of Appeals for the Tenth Circuit. That court dismissed the appeal for lack of jurisdiction, concluding that the appeal represented a "case or controversy" arising under the ESA, and thus falling within TECA's exclusive purview. The Supreme Court reversed, holding that the matter for determination was the validity of a

criminal conviction under 18 U.S.C. § 401, not any ESA issues, and thus the conviction was within the circuit court's jurisdiction.

The short opinion in *Bray* apparently did not contemplate that the decision to enforce the subpoena might itself involve the adjudication of an ESA issue, or that the invalidity of the district court's enforcement order under the ESA might be raised on appeal of the criminal contempt conviction as a defense. Perhaps as a consequence, *Bray* does not provide how the Circuit Court of Appeals should determine a criminal conviction appeal in which ESA or EPAA issues are raised defensively. We, however, need not explore these interesting problems here. In this case, no contempt proceeding under 18 U.S.C. § 401 was commenced, and the petitioners do not seek review of a criminal conviction. Hence, *Bray* is inapposite. We have repeatedly recognized our jurisdiction to entertain mandamus petitions in circumstances similar to this case. *See United States Dep't of Energy v. Brett*, 659 F.2d 154 (TECA 1981) (per curiam), *cert. denied*, 456 U.S. 936 (1982); *United States Dep't of Energy v. Crocker*, 629 F.2d 1341 (TECA 1980) (per curiam). Accordingly, we conclude that we have jurisdiction to determine the issues posed by this petition.

MERITS

On the merits, the petitioners argue that the district court erred on several grounds. First, petitioners argue that since the statutory scope of review of agency action is confined to review of the record developed before the agency adjudicators, further discovery, save in exceptional circumstances not involved here, is improper. Second, petitioners argue that even if discovery were not generally improper, the contested documents are not "matter . . . relevant to the subject matter of the pending action" or "matter . . . reasonably calculated to lead to the discovery of admissible evidence," and hence not discoverable under Fed. R. Civ. Proc. 26(b)(1). Third, petitioners contend that even if marginally relevant, the contested documents are protected by the qualified executive privilege, and the district court incorrectly ruled that Inexco's proper need for the documents outweighed the governmental and public interest in non-disclosure.

We decline to resolve petitioner's first and third contentions, because we are convinced that these documents are irrelevant to any proper issue before the district court for resolution. The order of the district court and Inexco's brief before this court are remarkably vague in addressing the materiality of the requested documents to Inexco's case. A close review of the record below, however, reveals that Inexco principally advanced, and the district judge principally relied on, Inexco's contention that the requested documents were material to proving that DOE's interpretation of the "posted price" definition urged below was inconsistent with its "contemporaneous construction" of that term, and therefore, was either invalid or not entitled to judicial deference.

Inexco's campaign against DOE's current interpretation of the "posted price" term has been previously fought, and lost. In *Dep't of Energy v. Osborn*, 760 F.2d 282 (TECA 1984), *Mountain Fuel Supply Co. v. United States Dep't of Energy*, 656 F.2d 690 (TECA 1981), and *Grigsby v. Dep't of Energy*, 585 F.2d 1069 (TECA 1978), this court has repeatedly ruled that the DOE's current interpretation of the regulatory "posted price" term is valid, rational and entitled to judicial deference. In *Mountain States*, this court rejected, over the dissent of Judge Jameson, the arguments that the history of DOE's interpretation of the "posted price" term had been so erratic and confusing that its current interpretation either was invalid or was not entitled to judicial deference under the "contemporaneous construction" doctrine suggested by the decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Mountain States*, 656 F.2d at 695. Further, the court in that case found no merit in the due-process argument that the agency's late-blooming construction of the "posted price" term had besmirched that provision with "the taint of retroactivity." *Id.*

In *Osborn*, Judge Jameson, writing for the court, reviewed *Grigsby* and *Mountain States*, and concluded: "[T]hese two prior decision leave no doubt . . . that the agency's interpretation of its own regulation is valid." 760 F.2d at 284. This court's holding that DOE's interpretation of the "posted price" term is valid, and not infirm on either due process or contemporaneous construction grounds, represents a legal conclusion, *Grigsby*, 585 F.2d at 1079

("[t]he issues argued on this appeal are legal, not factual issues . . . ."), which is binding on the district courts until it is either reversed or overruled.

Accordingly, Inexco may not put in issue below the validity of the DOE's current interpretation of the posted price term, nor may it urge that its interpretation is not due judicial deference. The contested documents, which were sought, and ordered produced on the grounds of Inexco's need to prove the agency interpretation invalid on contemporaneous construction and due process grounds, are therefore not material to any proper issue in the district court. Consequently, the order mandating production of those documents was error.

Inexco contends that even if the district court erred in ordering production, mandamus does not lie to correct the error. We recognize that the writ of mandamus is an extraordinary judicial remedy, *MGPC, Inc. v. Dep't of Energy*, 673 F.2d 1277, 1283 (TECA 1982), the use of which should not be permitted to circumvent federal statutory policy disfavoring interlocutory appeals. At the same time, where substantial claims of privilege are overruled at the discovery stage, and the order compelling discovery involves the adjudication of EPAA issues, this court possesses the discretion to review the production order by writ of mandamus, because once the disclosure is made, the erroneous compulsory disclosure may, as a practical matter, be irremediable by the usual appellate process. Accordingly, we have previously recognized our authority to review, upon petition for writ of mandamus, district court orders compelling the disclosure of information as to which substantial claims of privilege have been asserted. *See United States Dep't of Energy v. Brett*, 659 F.2d 154 (TECA 1981) (per curiam), *cert. denied*, 456 U.S. 936 (1982); *United States Dep't of Energy v. Crocker*, 629 F.2d 1341 (TECA 1980) (per curiam).

Given that this case presents a proper case for review by mandamus, issuance of the writ is appropriate even where our conclusion of district court error does not require decision of the privilege issues posed. *See e.g. Sanderson v. Winner*, 507 F.2d 477, 480 (10th Cir. 1974) ("[i]n view of our ruling that the matters sought . . . are irrelevant, we deem it unnecessary to

determine whether the documents sought are privileged") (mandamus issued), *cert. denied*, 421 U.S. 914 (1975).

Accordingly, a writ of mandamus shall issue directing the district court to vacate its order of January 4, 1985 compelling production.[1]

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[1] The district court held that four of the requested documents must be produced because they should have been included in the administrative record. We disagree. The district court did not detail the reasons for its finding. Ordinarily, however, the administrative record is appropriately supplemented in the district court only where it is discovered that evidence considered by the agency adjudicators was, because of clerical mistake or other oversight, not included in the administrative record forwarded to the district court. *See MGPC, Inc. v. Duncan*, 581 F. Supp. 1047, 1058 (D. Wyo. 1984). Our review of the record makes plain that the four documents were not before the OHA officers or FERC commissioners when they decided Inexco's appeals. In a case such as this, where the principal issue is whether the agency findings are supported by substantial evidence, the district court lacks the authority to supplement the record with a view to weighing evidence not considered by the agency adjudicators. *See International Brotherhood of Electrical Workers v. Boldt*, 513 F.2d 1405, 1407 (TECA 1975) ("the [agency's] decision must stand or fall on the basis of the evidence then before it"). The district court's conclusion that the four documents must be produced was error.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

INEXCO OIL COMPANY, *Plaintiff,* vs. UNITED STATES DEPARTMENT OF ENERGY, *Et. Al.* *Defendants.*	No. C83-0513

ORDER ON DISCOVERY MOTIONS

This matter came before the Court on November 6, 1984 at final pretrial conference at which Richard T. Barrett, Esq. and Roger A. Rider, Esq. appeared for plaintiff, and Rodney L. Solenberger, Esq. appeared for defendants. During the course of such conference counsel presented arguments to the Court concerning defendants' Motion for Review and Stay of Magistrate's Discovery Order. Following such argument the Court instructed defendants' counsel to submit to the Court for *in camera* review the sixty-six (66) documents which are claimed to be privileged, together with a supporting brief and Vaughn index. At the time defendants submitted such materials to the Court they waived all privilege objections concerning documents *P27* and *27A*, *P30* and *P32*, and submitted most of the remaining documents to the Court. The Court having reviewed such documents, together with the pleadings in this matter, having considered the arguments of counsel, and being fully advised in the premises, FINDS and ORDERS as follows:

United States Magistrate William C. Beaman, in his October 23, 1984 Order, found that defendants' interests in avoiding an undue chilling effect upon intra-agency communications were inadequate to override plaintiff's interest in ensuring a full and complete review of the record in this proceeding, and categorically overruled each of defendants' objections to discovery, order-

ing production of all sixty-six (66) documents. Magistrate Beaman concluded that defendants' interests in avoiding disclosure of these documents were not substantial since the requested documents pertain to a scheme of price regulation which is now defunct, and since most of the requested documents are old, in most cases dating back five (5) to ten (10) years, or more.

The deliberative process privilege protects from discovery intra-agency communications which reveal the "cerebrations and mental processes" of government officials. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 40 F.R.D. 318, 329 (D.D.C. 1966), *aff'd on opinion below* 384 F. 2d 979 (D.C. Cir.), *cert. denied* 389 U.S. 952 (1967); *United States v. Morgan*, 313 U.S. 409, 422 (1941); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). While a variety of reasons have been forwarded in explaining the policies underlying this privilege, the primary concerns are protection of the integrity of the administrative processes, and encouraging the free flow of intra-agency discussions by avoiding the chilling effects which would result from disclosures. *Id.* However, not every recommendation made by an agency official is privileged, since the privilege protects only those communications which are "deliberative" in nature. *Coastal States Gas Corporation v. D.O.E.*, 617 F.2d 854 (D.C. Cir. 1980); *United States v. Ahmad*, 499 F.2d 851, 855 (3rd Cir. 1974). A document is deliberative in nature if it reveals evaluation, recommendations and analyses of factors, or, put another way, if it reflects the give-and-take of the consultative process. *Coastal States Gas Corporation v. D.O.E.*, supra 617 F.2d at p. 866; *United States v. Exxon*, supra 87 F.R.D. at p. 637. All presumptions favor discovery, and the burden is on the defendant agency to show a given document formed a direct path in a specific decisional process. *Vaughn v. Rosen*, 484 F.2d (D.C. Cir. 1973) *on remand* 383 F. Supp. 1049 (D.D.C. 1974), *aff'd.* 523 F.2d 1136 (D.C. Cir. 1975). Therefore the privilege should be claimed in the form of an affidavit, rather than by a mere assertion in interrogatories or production answers, or in a motion objecting to discovery. *United States v. Exxon*, supra 87 F.R.D. at p. 637; Cf *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, supra 40 F.R.D. at p. 323. Only those portions of a document which constitute "recommendations" or "opinions" are protected, and generally factual matters disclosed in such docu-

ments must be revealed. *United States v. Exxon*, supra 87 F.R.D. at pp. 636-637; *National Courier Association v. Board of Gov. of Fed. R.S.*, 516 F.2d 1229, 1242 (D.C. Cir. 1975).

Finally, the predecisional process privilege is not absolute in nature, and the final determination concerning the discoverability of document must be made through a balancing of the plaintiff's interests in obtaining a full and fair review of the record against the agency's interest in avoiding discovery of deliberative materials. *In re D.O.E. Stripper Well Exemption Litigation*, 4 Energy Mgt. (CCH) para. 26, 267 at p. 28,087 (D. Kan. 1980); *United States v. Ahmad*, 499 F.2d 851, 853 (3rd Cir. 1974); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 fn. 16 (1975); *E.P.A. v. Mink*, 410 U.S. 73, 86 n. 13 (1973); *Hickman v. Taylor*, 329 U.S. 495, 511-512 (1947); *Jencks v. United States*, 353 U.S. 657 (1957); *United States v. Nixon*, 418 U.S. 683 (1974). Thus the weight of plaintiff's need for each document must be measured against the extent to which such document reveals "deliberations", and the actual chilling effect disclosure would cause, and disclosure may be required where plaintiff's need is adequate to override the agency's competing interest. *Id.*

Magistrate Beaman correctly concluded that defendants' interests in avoiding disclosure is lessened due to the fact that the deliberations in question involve a regulatory scheme which is presently defunct due to the issuance of Executive Order No. 12,287, *Decontrol of Crude Oil and Refined Petroleum Products*, 46 Fed. Reg. 9909 (1-30-81), and due to the fact that almost all of the documents in question are relatively old, and were generated in proceedings which have been completed for many years. *In re D.O.E. Stripper Well Exemption Litigation*, 4 Energy Mgt. (CCH) para. 26,267 (D. Kan. 1980); *United States v. Ahmad*, 499 F.2d 851, 853 (3rd Cir. 1974). However, rather than rule categorically that all the documents requested should be produced, the Court concluded that a proper balancing of the competing interest required an *in camera* review of each document, and an individual determination in each instance.

In many instances defendants have failed to articulate grounds, much less establish a basis, to support its privilege claims. Frequently the author, recipient, date, and/or specific deliberative

process are not even identified in defendants' Vaughn index. No supporting affidavits were submitted by defendants to show that any given document formed a direct path in a specific deliberative process, or to identify the exact harm to the agency which would purportedly flow from disclosure of any given document. Defendants' Vaughn index repeatedly alleges disclosure would have a chilling effect upon predecisional deliberations, without supplying a basis for such allegation. Thus, in many instances defendant failed to establish grounds for its discovery objections.

Furthermore, defendants take an unduly expansive view of the predecisional deliberative process privilege. Every document generated by an administrative agency relates to some "process" within the agency, and all documents generated prior to the final decision or action is "predecisional." Under defendants' view of the privilege no discovery could ever be obtained from an administrative agency since only final, published rules, regulations or orders would be subject to disclosure. Clearly this view is not supported by the narrow privilege defined in the cases cited above. After reviewing each of the submitted documents the following determinations were made concerning defendants' discovery objections:

P1. Defendants fail to identify the author, recipient, date or specific deliberative process relating to this document. The document does not contain any of the direct give-and-take the deliberative process privilege is designed to protect. Without more information it is impossible for the Court to determine whether this document contains the recommendations of a subordinate, or rather the mandates of a superior. The Court cannot determine whether the position suggested in the document was rejected by the agency, or was finally adopted as the agency's position; neither can the Court make an accurate determination concerning the harm, if any, which would flow from disclosure of this document. Clearly an unidentified author of this document would suffer no embarrassment should its contents be revealed. Defendants' unsupported claims that harm would result should this document be disclosed are inadequate to override the presumption favoring discovery to enable a full and fair review of the record in this proceeding. Any interests defendants may have in

avoiding the disclosure of this document are clearly overridden by plaintiff's interest in obtaining such full and fair review of the administrative record in this proceeding.

P2. This document summarizes a meeting held May 30, 1973 to discuss oral comments presented to Dick Laulor concerning the clearance of forms CLC-8 and CLC-9. Defendants have failed to identify the specific deliberative process which generated this document, or the role such document played in such process. The document merely summarizes the subject matter of discussions at the meeting, and only the last two sentences on page 1 and the first sentence on page 2 even remotely reveal mental processes. Plaintiff's need for the document clearly overrides any interests defendants may have in avoiding its disclosure.

P3. This is a five page memorandum written May 30, 1973 from William Johnson to P.L. Essley, Jr. Defendants have not revealed what position each party to the document held, and therefore it is not possible to determine with certainty whether this memorandum constitutes the recommendations of a subordinate officer, or the mandates of a superior. The first four paragraphs of this document are factual; much of the remainder of the copy of the document submitted to the Court is illegible, and therefore these portions may also be factual. The document contains a contemporaneous construction of the regulations at issue in this proceeding, and therefore plaintiff's need for this document is compelling. The document is nearly eleven years old, and concerns proceedings which have been closed for nearly as long. Plaintiff's need for this document is adequate to override defendants' interest in avoiding its disclosure.

P4 and *P5.* See discussion concerning document *P1*, supra.

P6. This is a two page White House memorandum dated May 1, 1973. Defendants have failed to identify the specific deliberative process which generated this document, or the role this document played in such process. The document appears to involve inter-agency, rather than intra-agency communications. Any interest defendants may have in avoiding disclosure of this document is clearly overriden by plaintiff's need for the same.

P7. This is a two page memorandum from Mike Ware to David Albinson dated October 10, 1973. The position of the parties is not revealed. (See discussion concerning document *P3*, supra). The memorandum does not address any specific proposals, but rather only identifies a series of problems encountered in the use of form CLC-90. No specific deliberative process is identified which generated this document, nor is the role this document played in such process revealed. Any interest defendant may have in avoiding disclosure of this document is clearly overriden by plaintiff's need for its disclosure.

P8. This is a one page memorandum from Chuck Boehl to Chachie Owens dated November 10, 1973. The position of the parties to the document is not revealed. The specific deliberative process which generated this document is not identified nor is the role this document played in such process set forth. The memorandum only identifies problems which need to be addressed by defendants, and does not contain evaluations, recommendations or analyses of factors, and therefore is not deliberative in nature. Any interest defendants may have in avoiding disclosure of this document is clearly outweighed by plaintiff's need for the same.

P9. This is a five page draft FEA Investigative report concerning Grigsby Oil Company dated April 25, 1975 written by Mary D. Proctor, an investigator, to D.M. Fowler, Regional Administrator. The proceedings which generated this document have been closed for many years. The draft merely summarizes facts discovered through the relevant investigation, and does not contain evaluations, recommendations or analyses of factors, and therefore is not deliberative in nature. The weight of defendants' interest in avoiding disclosure of this document cannot be measured since no final version of this draft has been submitted to the Court, and therefore the Court cannot determine whether this document embodies a position which was subsequently rejected by the agency, or whether such position was ultimately adopted. Plaintiff's need for this document clearly overrides any apparent interest defendants have in avoiding its disclosure.

P10 and *P10A*. These are two copies of a transmittal memorandum dated September 24, 1975 sent with a Notice of Probable Violation (NOPV) from Alvin A. Ohm, Office of Regional

Counsel, Region VI, to Compliance Division Personnel in Region VI. Defendants assert only a predecisional deliberative process privilege in relation to this document. This document does not contain recommendations, evaluations or analyses of factors, but rather is a mandate of a superior officer concerning changes made, in relation to a draft NOPV, and constitutes the working law of the agency. The record reveals the author of this document participated in this proceeding. Plaintiff's need for this document clearly outweighs any interest defendants may have in avoiding its disclosure.

P11 to *P11G*. These are eight copies of a draft NOPV to be issued to Grigsby Oil Company. The authors, recipients, and dates of such drafts are not revealed, and no final version of the NOPV has been submitted for purposes of comparison, so as to enable the Court to determine whether these drafts embody the positions ultimately adopted by the agency. Defendants assert only a predecisional deliberative process privilege in relation to this document. See discussions concerning documents *P1* and *P9*, supra.

P12. This is a transmittal memorandum from Robert Long of the Office of Case Resolution to Carl Corrallo of FEA's Office of General Counsel dated November 28, 1975 which was attached to a draft NOPV concerning Grigsby Oil Company. Defendants assert only a predecisional deliberative process privilege in relation to these documents. This document merely summarizes the contents of the draft NOPV, and does not contain any recommendations, evaluations or analyses of factors. No final version of this document has been submitted. Plaintiff's need for this document clearly outweighs any interest defendants may have in avoiding their disclosure.

P13 and *P13A*. These are copies of a two page memorandum from Alvin Ohm, Office of Regional Counsel, Region VI to Carl Corrallo and Everard A. Marseglia of the Office of General Counsel dated October 9, 1975. Defendants assert only a predecisional deliberative process privilege in relation to this document. No specific deliberative process which generated this document is revealed, and the role such document played in such process is not explained. The memorandum states the author's

understanding of the proper application and definition of the term "posted price" and requests clarification from the National Office. The author of the document participated in this proceeding. Plaintiff's need for this document is compelling, and is adequate to override any interest defendants may have in avoiding its disclosure.

P14 and *P14A*. These are two copies of a thirty page memorandum entitled "A Domestic Crude Oil Pricing Guide for Crude Producers, Crude Purchasers, and Crude Resellers" sent from Gordon W. Harvey, Director, Office of Compliance Policy and Planning, Regulatory Programs to Regional Administrators, Regions V, VI, VII, and IX, dated February 9, 1976. No final version of this draft has been identified or submitted for purposes of comparison. See discussion concerning document *P9*, supra.

P15 and *P15A*. These are two copies of a memorandum from Larry White, Regional Director Compliance Division, to Gorman Smith, Assistant Administrator, Office of Regulatory Programs dated January 27, 1976. Only the last paragraph on page two is responsive, and the remainder of this document may be excised. The responsive portion of this document does not discuss or analyze any specific proposals, but merely states that problems exist under the present regulations which need to be resolved through some administrative process. The record indicates the author of this document participated in this proceeding. Plaintiff's need for this document clearly outweighs any interest defendants may have in avoiding its disclosure.

P16. The author, recipient, date, specific deliberative process, or significance of this draft speech is not identified. The Court cannot determine whether this draft was in fact used by defendant, or whether it was subsequently modified. See discussion concerning document *P1*, supra.

P17 to *17B*. These are copies of a memorandum concerning the "Clarifications to the Price Regulations Concerning Crude Oil" Dated May 10, 1976, sent from Everard A. Marseglia, Jr. and Carl A. Corrallo to J. Peter Leudtke, Assistant General Counsel for Pricing. Defendant asserts only a predecisional deliberative process privilege in relation to this document. Only

page 2 of this document is responsive, and the remainder may be excised. While this document is deliberative in nature, the agency subsequently adopted the position recommended, and therefore defendants' interest in avoiding disclosure of this document is not substantial. Conversely, the author of this document participated in this proceeding, and the responsive portions of this document constitute a contemporaneous construction of the term "posted price". Plaintiff's need for this document is compelling, and clearly overrides any interest defendants may have in avoiding its disclosure.

P18. This is a four page memorandum dated May 12, 1976 from Larry White, Regional Director Region VI to Gorman C. Smith, Assistant Administrator Regulatory Programs, FEA. Only the last paragraph on page 3 is responsive, and the remainder of the document may be excised. See discussion concerning documents *P17* and *P17A* supra.

P19. This is a six page memorandum dated June 6, 1976 entitled "Panel Discussion Summary on Clarification to Domestic Crude Oil Price Regulations." The author of this document, and the role it played in the specific deliberative process is not revealed. Only page 4 is responsive, and the remainder of this document may be excised. The responsive portions of this document are primarily factual. The position recommended was ultimately adopted by the agency, and therefore defendants' interest in avoiding its disclosure are not substantial. Conversely, plaintiff's need for the document is compelling, and is adequate to override defendants' competing interests.

P20. This is a memorandum dated August, 1976 which discusses the draft of the Clarification Amendments to pricing regulations. The author and recipient are not identified. See discussion concerning document *P1*, supra. Only pages 8 and 9 of this document are responsive, and the remainder of the document may be excised. This document contains a contemporaneous construction of the term "posted price", and plaintiff's compelling need for the document overrides any interest defendants may have in avoiding its disclosure.

P21. This is an eight page draft memorandum dated August 10, 1976 from Rendel Alldredge to Edwin Mappe entitled "Proposed Rule Making, Definition of Posted Price." No final version of the memorandum has been identified or submitted. While this document contains deliberations, it also constitutes a contemporaneous construction of the term "posted price", and identifies perceived problems under the pricing regulations in effect at that time. Plaintiff's need for this document is compelling, and is adequate to override defendants' interest in avoiding its disclosure.

P22 and *P22A.* These are copies of a draft memorandum from Mike F. Butler, FEA General Counsel, to John A. Hill, Deputy Administrator, and Frank G. Zarb, Administrator, of FEA dated August 11, 1976, which were transmitted with the final draft of the Clarification of the Mandatory Petroleum Price Regulations Applicable to Domestic Crude Oil which was subsequently published in the Federal Register. The documents are not "predecisional" nor "deliberative" in nature, but rather explain the decision previously made by the agency officials. No final "draft" of the memorandum has been submitted or identified. Any interest defendants may have in avoiding the disclosure of this document are clearly overriden by plaintiff's need for the same.

P23. The author, recipient and date of this draft press release, and the final version of the draft, are not identified. See discussion concerning document *P1*, supra.

P24 to *P24M.* These are fourteen copies of drafts of the "Clarifications to Mandatory Petroleum Price Regulations Applicable to Domestic Crude Oil." The authors, and recipients are not identified. The responsive portions of these drafts are as follows: *P24*, *P24C*, *P24G*, *P24H*, and *P24I* at pages 49 to 56; *P24A* at pages 45 to 51; *P24B* and pages 26 to 32; *P24D* at pages 48 to 54; *P24E* at pages 47 to 54; *P24F* and *P24M* at pages 49 to 57; *P24J*, *P24K*, and *P24L* at pages 51 to 57. The remainder of these documents may be excised. It is important to note that the responsive portions of these documents do not vary in any substantive manner. Such portions do not contain the sort of handwritten notes found in non-responsive portions of such drafts. *P24L* includes a cover memorandum from Larry White, Regional

Director Compliance Division, to all area managers dated August 25, 1976 where White identifies the document as being a "final draft" and instructs the managers to apply the guidelines in all open and future cases. Therefore at the time this "draft" was forwarded it constituted the working law of the agency. Plaintiff's need for the responsive portions of these documents overrides any interest defendants may have in avoiding their disclosures.

P25. This is a memorandum from Chuck Boehl and Rendell Alldredge to Bart House apparently addressing issues surrounding the proposed rule making proceedings described in the preceding paragraph. The document was written around August 17, 1976. Only the last two paragraphs are responsive, and the remainder of the document may be excised. See discussion concerning document *P21*, supra.

P26. This is a memorandum from Rendel Alldredge to Barton House dated September 23, 1976 concerning the final draft of Proposed Revised Compliance Guidelines for Domestic Crude Oil Pricing — Producers and First Purchasers. The third and fourth full paragraphs on page 2 of this document directly addresses the subject matter of this proceeding. This discussion is not deliberative in nature, but rather identifies problems which had arisen under the then current regulatory scheme which needed to be resolved by the agency through rule making, and therefore are not deliberative. Plaintiff's need for this document is compelling and is adequate to override any interest defendants may have in avoiding its disclosure.

P27 and *P27A.* Defendants released these documents to plaintiff.

P28 and *P28A.* These are copies of a draft Exceptions and Appeals Decision and Order concerning Grigsby Oil and Gas Company. The author and recipient of this draft are not identified, and the final draft of this document has not been identified nor submitted for purposes of comparison. See discussions concerning documents *P1* and *P9*, supra. Plaintiff's need for this document is compelling, and is adequate to override defendants' interests in avoiding its disclosure.

P29. This is an undated, twenty-one page speech. The author, recipient, and specific deliberative process which generated this document are not identified. The document is not deliberative in nature, but rather merely explains the application and effect of regulations in existence at that time. See discussion concerning document *P16*, supra.

P30. Defendants released this document to plaintiff.

P31 and *P31A*. These are copies of a fifty-two page draft ruling entitled "Ruling 1977, Clarifications to Mandatory Petroleum Price Regulations Applicable to Domestic Crude Oil." Only pages 41 to 48 are responsive, and the remainder of the document, together with the handwritten notes contained within the responsive portions of document *P31* may be excised. The remainder of the document contains a contemporaneous construction of agency regulations relevant to this proceeding, and plaintiff's compelling need for this discussion is adequate to override any interests defendants may have in avoiding their disclosure.

P32. Defendant released this document to plaintiff.

P33 and *P33A*. These are non-identical drafts of "A Compliance Guide for Domestic Crude Oil Policy for Producers and First Purchasers." The authors and recipients of these drafts are not identified. See discussion concerning document *P1*, supra. The responsive portions of each document are found at pages 23 to 26 and 36, and the remainder of these documents may be excised. The responsive portion of these documents are not predecisional or deliberative in nature, but rather explain the effect of clarifications set forth in Ruling 1977-1. Portions of the copy of document *P33A* are not legible due to the poor quality of the photocopy submitted to the Court. All documents submitted by defendants to plaintiff pursuant to this Order of the Court must be legible and complete. Plaintiff's need for these documents is compelling, and overrides any interest defendants may have in avoiding their disclosure.

P34 to *P34B*. These are three copies of a four page memorandum from Herbert Buchanan to all Region VI managers. Mr. Buchanan's position is not identified, and it is impossible for the Court to determine whether this constitutes the mandate of a

superior, or rather the recommendations of a subordinate officer. Furthermore, the specific deliberative process which generated this document is not identified. The document is not deliberative in nature, but rather explains the application and effect of existing regulations under specific factual circumstances, and identifies issues which need to be resolved by the agency. Plaintiff's need for this document overrides any interest defendants may have in avoiding its disclosure.

P35. This is an eighteen page draft memorandum dated August 31, 1973 bearing the caption "For Consideration by Counsel." Defendants assert only a predecisional deliberative process privilege in relation to this document. The author and recipient of this document are not identified. See discussion concerning document *P1*, supra. No specific deliberative process is identified. The document is not deliberative in nature, but rather explains the proper construction of existing regulations, and their applicability to given factual situations. This document contains a contemporaneous construction of regulations relevant to this proceeding, and plaintiff's compelling need for this document overrides any interest defendants may have in avoiding its disclosure.

P36. This is a twenty page draft notice of proposed rule making regarding the "Clarification to Mandatory Petroleum Price Regulations Applicable to Domestic Crude Oil." Only pages 9 through 12 are responsive, and the remainder of this document may be excised. Plaintiff's compelling need for this document is adequate to override any interest defendants may have in avoiding its disclosure.

P37 and *P37A.* This is an undated three page memorandum entitled "Characteristic Situations Which Posted Price Ruling Must Resolve." The author and recipient of this document are not identified. See discussion concerning document *P1*, supra. The document is not deliberative in nature, and merely poses issues which its author believes are unanswered under the existing regulatory scheme. Any interest defendants may have in avoiding disclosure of this document are overriden by plaintiff's compelling need for the same.

P38. This is an undated two page memorandum entitled "The Posted Price Ruling (RBA Comments)." See discussion concerning documents *P37* and *P37A*, supra.

P39. This is an undated three page memorandum entitled "Characteristic Situations Which Posted Price Ruling Must Resolve." See discussion concerning documents *P37* and *P37A*, supra.

P40. This is a two page memorandum entitled "Personal Alldredge Notes on Proposed Price Ruling." See discussion concerning documents *P37* and *P37A*, supra.

P41 and *P41A.* These are two copies of an undated seven page draft of correspondence between Michael F. Butler, General Counsel, and William E. Enrich, Jr., Deputy City Attorney of Long Beach, California, concerning a May 27, 1975 request for interpretation of the applicable ceiling price of certain domestic crude oil under applicable regulations. The author and recipient of this document are not identified, and no final version of the draft has been submitted to the Court for purposes of comparison. See discussions concerning documents *P1* and *P9*, supra. This document is not deliberative in nature, but rather only explains the application and effect of existing regulations to given factual situations. Plaintiff's need for this document clearly overrides any interest defendant may have in avoiding its disclosure.

P42. This is a four page memorandum for General Counsel dated November 11, 1976, and prepared by Rendel B. Alldredge concerning a request for interpretation by Murphy Oil Company submitted October 11, 1976. This document is not deliberative in nature, but rather explains the application and effect of existing price regulations to given factual situations. Plaintiff's need for this document clearly overrides any interest defendants may have in avoiding its disclosure.

P43 and *P43A.* These are two copies of an undated memorandum entitled "Federal Energy Administration (10 C.F.R. Part 212) Posted Price Manual. . .Notice of Inquiry." The author and recipient of this document and the specific deliberative process in which it was generated are not identified. Furthermore, this document is not deliberative in nature, but rather merely explains

the application and effect of existing regulations to given factual situations. Plaintiff's compelling need for these documents clearly overrides any interest defendants may have in avoiding their disclosure.

P44 and *P44A*. These are two copies of a one page memorandum from Rendel B. Alldredge to Edwin P. Mampe dated June 1, 1977 entitled "Posted Price Notice of Inquiry." See discussion concerning document *P21*, supra.

P45. Defendants failed to submit a copy of this document for *in camera* review. Defendants' Vaughn index indicates that this document, like several of the documents described above, contains an explanation concerning the application and effect of existing regulations under given factual circumstances, and therefore is not deliberative in nature, and also constitutes a contemporaneous construction of regulations relevant to this proceeding. The final version of this memorandum has not been identified nor submitted for purposes of comparison. Plaintiff's compelling need for this document clearly overrides any interest defendants may have in avoiding its disclosure.

P46. This is a two page memorandum dated October 8, 1975 from Alvin A. Ohm, Office of Regional Counsel, to Romulo Garcia and Mark Ables, two Compliance Division personnel, concerning a draft NOPV relating to Pioneer Corporation. No final version of the NOPV has been identified or submitted for purposes of comparison. See discussion concerning documents *P9* and *P21*, supra.

P47. This is a two page memorandum dated October 29, 1975 from Alvin A. Ohm, Office of Regional Counsel, to Romulo Garcia and Mark Ables of the compliance division discussing an NOPV concerning O'Meara Brothers. Defendants assert only a predecisional deliberative process privilege in relation to this document. The final version of this document is not before the Court for purposes of comparison. See discussion concerning document *P9*, supra. This document is not predecisional nor deliberative, but rather constitutes the mandate of a superior officer to subordinate officers concerning changes made, or to be made, in the draft NOPV. The only analysis contained in the

document concerns the application and effect of existing regulations under the factual circumstances presented in that proceeding. Plaintiff's need for this document overrides any interest defendants may have in avoiding its disclosure.

P48. This is an undated five page draft NOPV in the O'Meara Brothers proceeding. No final version of this document has been identified or submitted for purposes of comparison. See discussion concerning document *P9*, supra.

P49. This is an undated eight page draft NOPV concerning proceedings relating to Mullins and Prochard, a partnership. The author and recipient are not identified, and no final version of this document has been identified or submitted for purposes of comparison. See discussions concerning documents *P1* and *P9*, supra. Furthermore the responsive portions of this document, found at pages 6 and 7, are not deliberative in nature, but rather merely explain the applicability and effect of existing regulations to the factual setting presented in that proceeding.

P50. This is a one page memorandum dated March 26, 1976 from Alvin Ohm to the "Reading File." No specific recipient, nor specific deliberate process in which this document was generated, or role this document played in such process, is identified. This document does not contain analysis concerning any proposals, but rather identifies problems which the author believed were presented under the then present regulatory scheme. Plaintiff's compelling need for this document overrides any interest defendants may have in avoiding its disclosure.

P51. This is a one page memorandum dated August 1, 1976 from Alvin A. Ohm, Office of Regional Counsel, to Larry White, Director Compliance Division, concerning the O'Meara NOPV. Defendants only assert a predecisional deliberative process privilege in relation to this document. This document is not deliberative in nature. See discussion concerning document *P47*, supra.

P52. This is a twenty-two page Remedial Order (RO) concerning O'Meara Brothers dated August 10, 1976. The author and recipient of this document are not identified. No final version of this document has been submitted for purpose of comparison. See discussion concerning documents *P1* and *P9*, supra.

P53. This is a two page memorandum from Thomas P. Humphrey, Acting Assistant General Counsel for Compliance Office of General Counsel to Barton Isenberg, Director of Audit and Enforcement, dated June 14, 1978 concerning a proposed NOPV privilege in relation to this document. This document is not deliberative in nature, but rather constitutes the mandate of a superior officer concerning changes made, or to be made, in a draft NOPV. This document should be included as part of the full and complete administrative record in this proceeding. *Citizens to Preserve Overton Park v. Volpe*, 402 U.S. 402 (1971).

P54. This is a two page memorandum from Burton Isenberg to L. Ken Jones, Acting Director of Enforcement, Region VI, dated July 14, 1978 concerning the proposed NOPV in *this* proceeding. This document is not deliberative in nature, but rather constitutes instructions by a superior officer concerning the proper procedure to be followed in this proceeding, and concerning changes to be made in the NOPV. This document should also be added to the administrative record in this proceeding.

P55 to *P55F.* These are seven non-identical drafts of the NOPV in this proceeding. *P55*, *P55D*, and *P55F* are copies of the same document. *P55A*, *P55B*, *P55C*, and *P55E*, are copies of a different document. *P55C* is dated June 29, 1977, and *P55* is dated November 7, 1977, and thus it appears the second group of documents is the earlier draft in the series. Alvin Ohm is identified as the author of *P55*. No other authors or dates, and not recipients of these documents are identified. See discussion concerning document *P1*, supra. Defendants ultimately adhered to the agency position set forth in these documents, and therefore their interest in avoiding disclosure of these documents is not substantial. Conversely, plaintiff's need for these documents is compelling, and is adequate to override defendants' competing interests. These documents should be added to the administrative record in this proceeding.

P56. This is a two page memorandum dated February 1, 1977 from Lon W. Smith Acting Director, Compliance Case Resolution to Avrom Landesman, Assistant General Counsel for Compliance, discussing a draft RO concerning I U. International Oil and Gas, Incorporated. No final version of the RO has been

identified or submitted for purposes of comparison. See discussions concerning documents *P9* and *P21*, supra. This document refers to attachments which were not submitted to the Court for *in camera* review, and such attachments shall be produced together with this document in complying with this Order of the Court. This document contains a contemporaneous construction of the regulations at issue in this proceeding, and plaintiff's compelling need for this document overrides any interest defendants may have in avoiding its disclosure.

P57. This is a one page memorandum from James B. Wilcox, Jr., Office of General Counsel, Compliance Division to Tony Gallagher, Office of Compliance Case resolution dated March 22, 1976 discussing the draft RO concerning I. U. International Oil and Gas, Incorporated. This document is not deliberative in nature, but rather merely identifies issues which must be resolved under the then present regulatory scheme.

P58. This is a two page draft memorandum dated March 18, 1977 from Charles Croxton, Director Regional Cases Division Compliance Case Resolution to Alvin Landesman, Assistant General Counsel for Compliance, Office of General Counsel, discussing a proposed RO concerning Berry Holding Company. No final version of this RO has been identified or submitted for purposes of comparison. This document is not predecisional nor deliberative in nature, but rather describes a decision made by the Regional Case Division. Plaintiff's need for this document is compelling, and overrides any interest defendants may have in avoiding its disclosure.

P59. This is a three page memorandum dated March 30, 1977 from Charles Croxton to Avrom Landesman concerning the Berry Holding Company RO. This document is not deliberative in nature, but rather discusses the applicability and effect of existing regulations to specific factual settings. See discussion concerning document *P58*, supra.

P60 and *P60A*. These are copies of a draft NOPV concerning Conoco's pricing in fields relevant to this proceeding which discuss the relation of plaintiff's letter offers to purchase upon posted prices in fields covered by the same. This document

reveals an early expression of the agency's position upon the issues which are contested in this proceeding. No final version of this NOPV has been identified or submitted for purposes of comparison. See discussion concerning document *P9*, supra. The Court believes the information contained in this document is so pertinent to the issues raised in this related proceeding that such document should have been included in the administrative record in this proceeding. Plaintiff's need for this document is compelling, and is adequate to override any interest defendants may have in avoiding its disclosure.

P61. This is a two page memorandum from Rueben Litz, RARP Auditor — Region VI, to Everett Seal, RARP manager, Region VI concerning Conoco pricing in fields relevant to this proceeding, and concerning the effect of plaintiff's letter offers to purchase upon the posted price in such fields. See discussion concerning documents *P60* and *P60A*, supra.

P62. This is a fourteen page draft of portion of an NOPV to be issued to Union Oil Company. The author and recipient of this document are not identified, and the final version of this NOPV has not been identified nor submitted for purposes of comparison. See discussions concerning documents *P1* and *P9*, supra.

P63. This is a four page memorandum entitled "Violation Supplement to Audit Report" concerning pricing by Ohio Oil Company (a predecessor to Marathon Oil Company) in the Grass Creek Frontier Unit. The author, recipient and specific deliberative process which generated this document have not been identified. See discussions concerning documents *P1* and *P9*, supra. The first page of the document is labeled "page 7". Defendant's Vaughn index states that this is a supplement to an audit report, which constituted pages 1 through 6. Defendants failed to submit this portion of the document for *in camera* inspection by the Court, and such portion shall be supplied plaintiffs together with this document in complying with the Court's Order. This document is not deliberative in nature and merely summarizes allegations concerning purported overcharges by Ohio Oil Company. Plaintiff's need for this document overrides any interest defendants may have in avoiding its disclosure.

P64. This is a seventeen page draft audit report concerning Champlin Production Company dated February 13, 1980 discussing pricing upon Champlin's properties in Kansas and Wyoming. The authors of the document are Henry W. Egleston, L. M. Halford, and D. J. Whittaker. The recipient of this document is not identified, and no final version of the report has been submitted for purposes of comparison. The responsive portions of this document are found at pages 11 through 14, and the remainder of the document may be excised. The document is not deliberative in nature, but rather states that Champlin misapplied pricing rules resulting in overcharges, identifies what the agency's officers concluded were the applicable posted prices, and computes the amount of alleged overcharges. The document explains the application and effect of existing regulations to specific factual situations. Plaintiff's need for this document overrides any interest defendants may have in avoiding its disclosure.

P65. This is an undated three page memorandum from Hank Egleston, Tulsa Crude Production Audit Branch, to Robert E. Boldt, Director, Office of Field Operations, Office of Special Counsel, entitled "Analysis of Champlin's Memorandum for OSC dated July 9, 1980." Defendants have failed to identify the exact role played by this memorandum in the deliberative process in which it was generated. The responsive portion of this document is found at page 1, paragraphs 2, 3, and 4, and the remainder of the document may be excised. This discussion is not deliberate in nature, but rather merely explains the application and effect of existing regulations to specific factual settings. Plaintiff's need for this document is adequate to override any interest defendants may have in avoiding its disclosure.

P66. This is a five page memorandum dated May 4, 1978 from E. W. Dorcheus, Acting Director, Office of Audit and Enforcement to Noah Baer, Compliance and Regional Operations Division, Office of General Counsel entitled "Bonus Price on Posted Prices." The specific deliberative process which generated this document, and the role played by this document in such process, are not revealed. The document appears to contain unpublished guidelines which constitute the working law of the agency rather than deliberation upon any given proposals. This document

contains a contemporaneous construction of the term "posted price", and the record indicates its author participated in this proceeding. Plaintiff's compelling need for this document clearly outweighs any interest defendants may have in avoiding its disclosure.

As was noted above, documents *P53* to *P55* and *P60* to *P61* should have been included in the administrative record of the proceedings below. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). The remaining documents provide needed background information which may be considered by the Court in evaluating the contentions raised by plaintiff in this proceeding. *Hiatt Grain and Feed Inc. v. Bergland*, 446 F.Supp 457 (D. Kan. 1978), *affirmed* 602 F.2d 929 (10th Cir. 1979) *cert. denied* 444 U.S. 1073 (1980). All production pursuant to this Order shall be made subject to the following protective measures:

(A) Plaintiff, and its counsel, shall not photocopy, or otherwise duplicate any document produced pursuant to this Order of the Court, nor any portion thereof;

(B) No document produced pursuant to this Order of the Court nor any portion thereof shall be disclosed to any person other than counsel and the parties to this proceeding;

(C) Plaintiff, and its counsel, shall not use any document produced pursuant to this Order of the Court, or any part thereof, for any purpose other than the trial in this matter. Now therefore it is

ORDERED that the October 23, 1984 Order of United States Magistrate William C. Beaman be, and the same hereby is, affirmed as modified by this Order of the Court; it is further

ORDERED that defendants produce to plaintiff forthwith full and complete legible copies of all requested documents not heretofore produced to plaintiff, subject to the limitations and the protective order set forth above.

Dated this *4th* day of January, 1985.

/s/ CLARENCE A. BRIMMER
United States District Judge

APPENDIX C

CLARENCE A. BRIMMER
U.S. District Judge

UNITED STATES DISTRICT COURT
District of Wyoming
P.O. Box 985
Cheyenne, Wyoming 82001

February 19, 1985

MS. DONNA M. BOLD
Clerk of Court
Temporary Emergency Court of Appeals
Room 2400 - U.S. Courthouse
Washington, D.C. 20001

Re: *The United States Department of Energy, et al. v. The Honorable Clarence A. Brimmer*

TECA No. 10-60

Inexco Oil Company v. United States Department of Energy, et al. USDC NO. C83-0513-B

Dear Ms. Bold:

The Court has stricken the trial setting of this case which was to be held on February 20, 1985 in view of the stay granted by the Court of Appeals. My law clerk received notice by telephone on February 11, 1985 that the panel has ordered that an answer to the petition be filed in this matter on or before February 26, 1985. This letter is written to advise the clerk, and the parties, that the Court does not intend to appear in this proceeding, and is submitted pursuant to the provisions of Rule 21(b) of the Federal Rules of Appellate Procedure.

However, the Court believes the present record in this proceeding must be supplemented to enable the members of the panel to review the documents as to which petitioners are asserting privilege claims, because:

(1) As the Court indicated in its Order on Discovery Motions, Petitioners' Vaughn index is not adequate to enable a full and fair

review of the merits of their privilege claims, and in fact is often misleading. Such Order, at page 6, states:

> Defendants' Vaughn index repeatedly alleges disclosure would have a chilling effect upon predecisional deliberations, without supplying a basis for such allegations.

Petitioners in their Vaughn index, describe various documents as containing "mental processes" and "deliberations." But an actual review of the described documents showed this Court that very often this was not the case.

(2) Inexco Oil Company challenges the validity of Petitioners' interpretation of their own regulations. The consistency of the agency's present position with prior constructions of the same regulations is an crucial issue in this action, since this factor defines the degree of deference the Court should afford to the agency's present position. *Skidmore v. Swift and Co.*, 323 U.S. 134, 140 (1944); *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 413-414 (1945); *Standard Oil Co. v. DOE*, 596 F.2d 1029, 1055-1056 (TECA 1978); *Mountain Fuel Supply Co. v. DOE*, 656 F.2d 1069, 1074-1075 (TECA 1978) (Jameson, J. dissenting). Inexco's due process interests in obtaining a full and fair review of the record in light of the surrounding circumstances, in the opinion of the Court, are substantial, and are adequate to override Petitioners' competing interests in avoiding discovery of those portions of the documents to be released, subject to the Court's protective order.

Under these circumstances the Court believes the documents reviewed *in camera* by the Court must be added to the record as exhibits, and should be reviewed by the Court of Appeals, in relation to the Petition. These documents are hereby submitted by the Court for this purpose.

Sincerely yours,

/s/
CLARENCE A. BRIMMER,
Chief Judge

CAB:cjt

Documents submitted under separate cover

cc: Roger Rider, Esq. w/out attachments
Richard J. Barrett, Esq. w/out attachments
Larry P. Elsworth, Esq. w/out attachments

Supreme Court, U.S.
FILED
FEB 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-922

In the Supreme Court of the United States

OCTOBER TERM, 1985

INEXCO OIL COMPANY, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Atlantic Richfield Co. v. *DOE*, 769 F.2d 771 5

Bray v. *United States*, 423 U.S. 73 ..... 4, 5

Camp v. *Pitts*, 411 U.S. 138 7

DOE v. *Brett*, 659 F.2d 154, cert. denied, 456 U.S. 936 4

DOE v. *Crocker*, 629 F.2d 1341 4

DOE v. *Osborn*, 760 F.2d 282 6

Grigsby v. *DOE*, 585 F.2d 1069, cert. denied, 440 U.S. 508 6

Mountain Fuel Supply Co. v. *DOE*, 656 F.2d 690 6

Pennzoil Co. v. *DOE*, 680 F.2d 156, cert. dismissed, 459 U.S. 1190 1

Texaco, Inc. v. *DOE*, 616 F.2d 1193 5

United States v. *Carlo Bianchi & Co.*, 373 U.S. 709 7

United States v. *Texas Energy Petroleum Corp.*, 719 F.2d 394 5

United States v. *Uni Oil, Inc.*, 646 F.2d 946, cert. denied, 455 U.S. 908 5

United States v. *Zang*, 645 F.2d 999, cert. denied, 454 U.S. 864 5

Page

Statutes and regulation:

Department of Energy Organization Act, Tit. V, 42 U.S.C. 7191 *et seq.* :

§ 502, 42 U.S.C. 7192 5
§ 503, 42 U.S.C. 7193 5

Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note 3

§ 211(d)(1), 12 U.S.C. (1976 ed.) 1904 note 7

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. (1976 ed.) 751 *et seq.* 3

§ 5(a)(1), 15 U.S.C. (1976 ed.) 754(a)(1) 7

Freedom of Information Act, 5 U.S.C. 552 5

18 U.S.C. 401 4

18 U.S.C. 1001 5

18 U.S.C. 1341 5

18 U.S.C. 1343 5

18 U.S.C. 1962 5

10 C.F.R. 212.73(b) 2

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-922

INEXCO OIL COMPANY, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner challenges the decision of the Temporary Emergency Court of Appeals, which issued a writ of mandamus directing the district court to vacate a document production order. Petitioner contends that the court of appeals lacked jurisdiction to issue the writ of mandamus and misapplied the doctrine of res judicata by ruling that three prior decisions approving the Department of Energy's interpretation of a regulation barred petitioner from challenging that interpretation.

1. In 1979, the Department of Energy (DOE)[1] issued a Proposed Remedial Order requiring petitioner to make

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[1]We use the term DOE to refer to the Department of Energy as well as to its predecessor agencies. The various agencies are set forth in *Pennzoil Co. v. DOE*, 680 F.2d 156, 161 & n.6 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).

restitution of nearly $100,000 plus interest for overcharges resulting from crude oil sales in violation of the then-effective price regulations. Pet. App. A2. Petitioner challenged the Proposed Remedial Order before DOE's adjudicatory arm, the Office of Hearings and Appeals (OHA), and sought discovery of internal DOE documents construing the regulatory term "posted price" (see 10 C.F.R. 212.73(b) (1974)), which OHA denied as irrelevant. Pet. App. A2-A3. After OHA adopted the Proposed Remedial Order as a Remedial Order, petitioner appealed to the Federal Energy Regulatory Commission (FERC). Petitioner initially declined to request discovery in that proceeding, but subsequently moved to discover documents similar to those sought in the prior proceeding. FERC denied petitioner's motion on the ground that it was untimely, and, after further briefing and argument, FERC affirmed the Remedial Order. *Id.* at A3.

Petitioner then sought review in the United States District Court for the District of Wyoming challenging, inter alia, the agency's interpretation of the regulatory term "posted price," upon which the Remedial Order is based. Pet. App. A3. Petitioner sought to discover internal DOE documents discussing or applying the "posted price" term. The magistrate ordered DOE to produce all the requested documents and denied DOE's motion for a protective order. *Ibid.* In response, the agency produced 165 documents and withheld 63 documents subject to the predecisional, deliberative process privilege. The magistrate granted petitioner's motion for an order compelling discovery of the withheld documents. *Ibid.*

DOE appealed the magistrate's order to the district court, which reviewed the disputed documents in camera and ordered DOE to produce all of the documents (Pet. App. A3-A4). The court ruled that several documents should have been included in the administrative record, that the

deliberative process privilege did not apply to any of the remaining documents, and that, even if the privilege was applicable, petitioner's need for the documents to challenge the agency's construction and application of its regulations outweighed the government's interest in non-disclosure (*id.* at A4, B21). DOE sought a stay of the order and a writ of mandamus from the Temporary Emergency Court of Appeals. The court of appeals granted a stay pending disposition of the petition for writ of mandamus. *Ibid.*

On October 2, 1985, the court of appeals issued a writ of mandamus ordering the district court to vacate its order compelling production of the disputed documents (Pet. App. A1-A9). The court first held that it had jurisdiction to adjudicate the issues presented by the petition, on the ground that the district court's ruling that the sought-after documents were relevant raised an issue under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. (1976 ed.) 751 *et seq.* (Pet. App. A4-A6). On the merits, the court held that the documents were irrelevant to any issue before the district court and that mandamus was the appropriate remedy in this case (*id.* at A7-A9).

2. The decision of the court of appeals is correct, does not conflict with any decision of this Court or of any other court of appeals, and presents no significant legal issue. Accordingly, review by this Court is not warranted.

a. Petitioner argues (Pet. 5-12) that the court of appeals lacked jurisdiction to entertain the DOE's mandamus petition. That claim is insubstantial. The limited jurisdiction of the Temporary Emergency Court of Appeals extends only to the resolution of issues arising under the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note, the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. (1976 ed.) 751 *et seq.*, and the regulations promulgated under these statutes. The underlying

action between petitioner and DOE challenges a DOE remedial order over which the Temporary Emergency Court of Appeals clearly has exclusive appellate jurisdiction. That court has repeatedly held that its jurisdiction to review such issues necessarily includes review of district court discovery orders that compel disclosure of privileged information related to ESA and EPAA claims. See, *e.g.*, *DOE* v. *Brett*, 659 F.2d 154 (Temp. Emer. Ct. App. 1981), cert. denied, 456 U.S. 936 (1982). As the court explained (Pet. App. A4-A5), a district court's ruling that certain evidence is relevant to DOE's construction of the EPAA "necessarily involves an adjudication of an EPAA issue." See, *e.g.*, *DOE* v. *Crocker*, 629 F.2d 1341, 1344 (Temp. Emer. Ct. App. 1980). Accordingly, the district court's ruling (Pet. App. B21, C2) that petitioner needed the privileged documents to support its challenge to the validity and consistency of DOE's interpretation of its EPAA regulations presented an issue over which the court of appeals had jurisdiction. *Id.* at A5.

Petitioner's reliance (Pet. 5-8) on *Bray* v. *United States*, 423 U.S. 73 (1975), is misplaced. There, a party refused to comply with a subpoena requiring the production of documents necessary for an investigation into possible violations of the ESA, and the government initiated criminal contempt proceedings under 18 U.S.C. 401. This Court held that the Temporary Emergency Court of Appeals lacked jurisdiction over an appeal from that party's contempt conviction, on the ground that the defendant's "refusal to obey a lawful order * * * initiated 'a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court' and was 'not a part of the original cause' " (423 U.S. at 75 (citations omitted)). Here, by contrast, no "separate and independent proceeding" was

commenced, nor did DOE "seek review of a criminal conviction" (Pet. App. A6). *Bray* therefore has no bearing on this case.[2]

Indeed, any other result would make no sense. For example, if DOE had refused to produce the privileged documents and the district court granted judgment for petitioner as a sanction, the Temporary Emergency Court of Appeals unquestionably would have exclusive appellate jurisdiction over an appeal from that judgment. By the same

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[2]Petitioner errs in claiming (Pet. 11) that the discovery order turns entirely upon an application of the deliberative process privilege without regard to the issues raised in the underlying action. In the first place, the court of appeals held that the documents were irrelevant and did not address the privilege issue petitioner raises in this Court (Pet. App. A8-A9). Moreover, the disclosure order was based on the district court's finding that petitioner needed the documents to establish a defense to DOE's remedial order, which is premised on an EPAA regulation. Pet. App. B21, C2.

Nor does the ruling here conflict with any of the decisions cited by petitioner (Pet. 8, 10). Each of those cases involved statutes other than the EPAA and raised no issue under that statute (or the ESA). See *Atlantic Richfield Co.* v. *DOE*, 769 F.2d 771, 778-780 (D.C. Cir. 1984) (review of the scope of Secretary of Energy's authority pursuant to Section 503 of the Department of Energy Organization Act, 42 U.S.C. 7193); *United States* v. *Texas Energy Petroleum Corp.*, 719 F.2d 394, 398 (Temp. Emer. Ct. App. 1983) (severable counterclaim filed pursuant to the Freedom of Information Act, 5 U.S.C. 552); *United States* v. *Uni Oil, Inc.*, 646 F.2d 946, 949-952 (5th Cir. 1981), cert. denied, 455 U.S. 908 (1982) (criminal prosecution for violations of 18 U.S.C. 1001, 1341, 1343 and 1962); *Texaco, Inc.* v. *DOE*, 616 F.2d 1193 (Temp. Emer. Ct. App. 1979) (adjudication of administrative action arising under Section 502 of the Department of Energy Organization Act, 42 U.S.C. 7192).

Finally, petitioner's speculation (Pet. 11) that the court's decision is "potentially insidious" because it allows a defendant in a criminal case to vest jurisdiction in the Temporary Emergency Court of Appeals by seeking interlocutory mandamus review is belied by that court's own decisions. See, *e.g.*, *United States* v. *Zang*, 645 F.2d 999, cert. denied, 454 U.S. 864 (1981).

token, if the district court had denied petitioner's discovery request and entered judgment for DOE, petitioner's appeal would lie only in the Temporary Emergency Court of Appeals. Yet both appeals would raise precisely the same discovery issue presented here. Therefore, it is under petitioner's argument that "appellate jurisdiction * * * will turn on the procedural vehicle chosen to obtain review" (Pet. 11).

b. The court of appeals also properly exercised its authority in issuing a writ of mandamus. The Temporary Emergency Court of Appeals would have exclusive jurisdiction over an appeal by DOE from a judgment in petitioner's favor holding that DOE's construction of its regulations was irrational. However, given the court of appeals' three prior decisions to the contrary,[3] mandamus was an appropriate means of enforcing the court's prior rulings, which make the documents petitioner sought irrelevant as a matter of law.

Petitioner errs in contending (Pet. 12-15) that the court of appeals relied on its prior decisions to foreclose petitioner's suit in this case. The decision below does not prevent petitioner from arguing that DOE's actions were not supported by substantial evidence or that the agency improperly applied its regulations in petitioner's case. The court of appeals simply held, on the strength of its prior rulings, that the documents petitioner sought were irrelevant because the agency's construction of its regulations was valid. That is a legal issue as to which discovery is irrelevant.

Additionally, because all of these documents are predecisional and since none is in the administrative record, which petitioner in part compiled, they may not be considered by

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[3]See *DOE* v. *Osborn*, 760 F.2d 282 (1984); *Mountain Fuel Supply Co.* v. *DOE*, 656 F.2d 690 (1981); *Grigsby* v. *DOE*, 585 F.2d 1069 (1978), cert. denied, 440 U.S. 508 (1979).

the district court. See *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"); *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) (emphasis deleted) ("[the 'substantial evidence'] standard goes to the reasonableness of what the agency did on the basis of the evidence before it").[4] The court of appeals' decision simply requires the district court to resolve petitioner's claims on the basis of the administrative record. Petitioner's discussion of the doctrine of res judicata is therefore wholly beside the point.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[4]ESA Section 211(d)(1), 12 U.S.C. (1976 ed.) 1904 note, which is incorporated by reference by EPAA Section 5(a)(1), 15 U.S.C. (1976 ed.) 754(a)(1), provides in relevant part:

> [N]o order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

Supreme Court, U.S.
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v.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

REPLY BRIEF OF PETITIONER INEXCO OIL COMPANY

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TABLE OF AUTHORITIES

Cases	Page
Asarco, Inc. v. EPA, 616 F.2d 1153 (9th Cir. 1980)	7
Atlantic Richfield Co. v. DOE, 769 F.2d 771 (D.C. Cir. 1984)	2, 4
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)	6
Bray v. United States, 423 U.S. 73 (1975) (per curiam)	2, 4
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)	7
Coastal States Marketing, Inc. v. New England Petroleum Corp., 604 F.2d 179 (2d Cir. 1979)	2
DOE v. Osborn, 760 F.2d 282 (TECA 1984)	5, 6
Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275 (D.C. Cir. 1981)	7
Exxon Corp. v. DOE, 91 F.R.D. 26 (N.D. Tex. 1981)	7
Grigsby v. DOE, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979)	5, 6
Gulf Oil Corp. v. DOE, 639 F.2d 766 (TECA 1981)	2
Inexco Oil Co., 7 DOE ¶ 83,015 (1981)	5
Mountain Fuel Supply Co. v. DOE, 656 F.2d 690 (TECA 1981)	5, 6
Mountain Fuel Supply Co. v. Johnson, 586 F.2d 1375 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979)	2
Scallop Corp. v. Tully, 705 F.2d 645 (2d Cir. 1983)	2, 4
Texaco Inc. v. DOE, 616 F.2d 1193 (TECA 1979)	2, 4
United States v. Uni Oil, Inc., 646 F.2d 946 (5th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982)	3
United States v. Wyatt, 680 F.2d 1082 (5th Cir. 1981)	2

Statutes	
Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note	1
Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et seq*	1

Miscellaneous	
4 K. Davis, *Administrative Law Treatise* §§ 21:1, 21:2, 21:6 & 21:7 (1983)	6
Restatement (Second) of Judgments §§ 34 and 83 (1982)	6

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REPLY BRIEF OF PETITIONER INEXCO OIL COMPANY

Respondents have mischaracterized the law concerning the scope of the jurisdiction of the Temporary Emergency Court of Appeals ("TECA") and TECA's improper use of *res judicata* below.

I.

Respondents suggest that TECA had jurisdiction of this mandamus proceeding because it concerns information "related to" claims under the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note, and/or the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. §§ 751 *et seq.*; because it "involved" the ESA or EPAA; and because TECA would have exclusive appellate jurisdiction of an appeal from a final judgment in an underlying controversy concerning the proper construction, applicability or effect of the ESA,

EPAA or regulations promulgated thereunder. DOE Mem. at 4-5. In *Bray v. United States,* 423 U.S. 73 (1975) (per curiam), this Court properly and emphatically rejected any suggestion that the foregoing factors invested TECA with jurisdiction over the appeal of that criminal contempt order. Respondents would limit *Bray* strictly to criminal contempt proceedings. DOE Mem. at 4-5. Inexco contends that this Court's analysis in *Bray* should be applied outside the criminal contempt context. Pet. at 8-12. Whatever the outcome on this question, this Court should issue a writ of certiorari in this case to resolve the intra- and inter-court conflict generated by TECA's decision below.

If Inexco is correct, the decision below must be vacated in order to preserve the substantial agreement among the appellate courts on the question of the proper scope of TECA's jurisdiction. The courts of appeals have held that TECA does not necessarily have jurisdiction over the entirety of a case involving matters arising under the ESA or EPAA, but only over those specific issues on appeal which arise under the ESA or EPAA and have been decided by the district court on that basis. *Texaco Inc. v. DOE,* 616 F.2d 1193, 1196-98 (TECA 1979); *Coastal States Marketing, Inc. v. New England Petroleum Corp.,* 604 F.2d 179, 187 (2d Cir. 1979). They have held that it is not enough that the underlying controversy has involved (or will or may involve) issues arising under the ESA or EPAA; the reviewing court must make its jurisdictional determination by reference solely to the specific issues presented to it. *Gulf Oil Corp. v. DOE,* 639 F.2d 766, 766-67 (TECA 1981). Moreover, under this analysis, an issue "arises under" the ESA or EPAA only if it "involve[s] the construction, applicability or effect" of either of those statutes or the regulations promulgated thereunder. *Atlantic Richfield Co. v. DOE,* 769 F.2d 771, 778-80 (D.C. Cir. 1984). *See Scallop Corp. v. Tully,* 705 F.2d 645, 647-49 (2d. Cir. 1983); *Mountain Fuel Supply Co. v. Johnson,* 586 F.2d 1375, 1382 (10th Cir. 1978), *cert. denied,* 441 U.S. 952 (1979); *see also United States v.*

Wyatt, 680 F.2d 1080, 1083-1085 (5th Cir. 1982); *United States v. Uni Oil, Inc.,* 646 F.2d 946, 950-51 (5th Cir. 1981), *cert. denied,* 455 U.S. 908 (1982).

Careful review of the district court's order below (*see* Pet. App. B) reveals that that court did not (and did not need to) adjudicate an EPAA issue. In that order, the district court made more than 25 separate citations to authorities addressing the proper application of the discovery provisions of the Federal Rules of Civil Procedure. Furthermore, the district court made at least 63 separate, express adjudications regarding the construction, applicability and effect of the discovery provisions of the Federal Rules of Civil Procedure, focusing on the inadequacy of Respondents' attempts to bring themselves within the scope of the pre-decisional, deliberative-process privilege.

In the entire 36 pages of the original order, however, there is not one citation to the ESA or the EPAA. Nor is there any decision by the district court below, express or implied, regarding the construction, applicability or effect of any provision of the ESA, EPAA or regulations promulgated thereunder. The court's few references to EPAA-related regulations note only the existence of the regulations or the possible existence of controversy regarding the meaning of the regulations. There is no attempt to resolve any controversy regarding the meaning of those regulations.

Respondents' attempt (DOE Mem. at 5 n.2) to distinguish the cases cited in Inexco's Petition is wholly inconsistent with their analysis elsewhere in the Memorandum. Each of those cases in some way "involved" or was "related to" the EPAA and, in at least three of the cases, final judicial resolution of the underlying controversy would require adjudication of an EPAA issue. In each case, however, the appellate court held that TECA did not have jurisdiction because the particular issue then on appeal did not involve the construction, applicability or effect of the ESA, EPAA or regulations promulgated thereunder. *See* Pet. at 8-11.

Respondents have suggested (DOE Mem. at 5-6) that the discovery issues in this case will, whatever the means chosen to obtain appellate review, be reviewable only in TECA. Nothing is further from the truth. Respondents have avoided mentioning the route chosen in *Bray* (appeal of a conviction for criminal contempt) where, by the express holding in *Bray*, jurisdiction lies only in the circuit court of appeals. Moreover, if the district court were to render judgment for Inexco as a sanction for Respondents' refusal to produce the documents, appeal of that judgment would not, as Respondents assert, "unquestionably" be to TECA — jurisdiction would lie in TECA only if the district court adjudicated an ESA issue in reaching its judgment (which is unlikely, as the district court would have rendered judgment as a discovery sanction, not on the basis of an interpretation or application of the ESA or the EPAA), and then only if the discovery issues on appeal were so intertwined with the ESA/EPAA issues as not to give rise to the need for a bifurcated appeal. *Atlantic Richfield Co. v. DOE*, 769 F.2d 771, 778 (D.C. Cir. 1984); *Scallop Corp. v. Tully*, 705 F.2d 645, 650 (2d Cir. 1983); *Texaco Inc. v. DOE*, 616 F.2d 1193, 1197-98 (TECA 1979).

In view of the foregoing, Inexco contends that TECA's decision below cannot be reconciled with the cases cited above. This Court should vacate TECA's order to restore consistency among the courts of appeals.

On the other hand, if Respondents are correct, *all of the foregoing cases are wrong*. In that unlikely event, this Court should take this opportunity to reject the analysis of those cases and declare that, except in the criminal contempt context, TECA has exclusive appellate jurisdiction of all cases that in any way "involve" or are "related to" the ESA or EPAA. Inexco submits that any such decision by this Court would generate all of the problems that this Court sought to lay to rest in *Bray*.

II.

TECA's decision on the merits of this interlocutory mandamus proceeding creates dangerous precedent that would be applicable to all proceedings in the federal judicial system for

review of administrative agency adjudications. Respondents now purport to give TECA's decision a narrow, innocuous reading. The actual decision, however, is not so limited. Accordingly, DOE and other federal agencies subsequently will be able to cite TECA's decision for two propositions that heretofore would have been unthinkable in American jurisprudence.

First, TECA held below that its prior decisions[1] reviewing the administrative interpretations of DOE regulations are irrebuttably binding on Inexco even though Inexco was not a party to any of those prior proceedings and even though those decisions were based upon (and thus limited by) the evidence introduced into the administrative records by parties other than Inexco having litigation objectives and resources different from those of Inexco. That holding is wholly inconsistent with fundamental principles of administrative law. A federal administrative agency may choose to make policy on a case-by-case basis through adjudications involving individual parties, or it may make policy by promulgating rules that are applicable to all entities. However, each avenue imposes certain limitations on the agency. An agency desiring to establish rules having the binding effect of a statute on all regulated entities must comply with statutorily mandated rulemaking requirements, including the requirements of notice to affected parties and an opportunity to comment. If, on the other hand, an agency elects to make policy in individual adjudications rather than rulemakings, the agency must bear the attendant burden of proving its case in each individual adjudication solely on the strength of the evidence in the administrative record of each such case. Both DOE and TECA earlier expressly recognized this limitation on DOE's ability to proceed against Inexco. *Inexco Oil Co.*, 7 DOE ¶ 83,015 at 86,159 n.5 (1981) ("we will not be bound by the *Osborn* determination"); *Osborn*, 760 F.2d at 284, 286 n.6. ("the specific issues of the Inexco case are not before us"). Remarkably, TECA now ignores the limitation.

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[1] *DOE v. Osborn*, 760 F.2d 282 (TECA 1984); *Mountain Fuel Supply Co. v. DOE*, 656 F.2d 690 (TECA 1981); *Grigsby v. DOE*, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979).

Moreover, due process does not allow DOE to misuse the doctrine of *res judicata* to foreclose all argument by subsequent litigants who were not parties to the previous cases and have had no opportunity to submit evidence or otherwise participate in those prior proceedings. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971). That limitation on *res judicata* is equally applicable to administrative adjudications. *Restatement (Second) of Judgments* § 83(1) and Comment c. at 272 (1982); 4 K. Davis, *Administrative Law Treatise* §§ 21:1, 21:2, 21:6 and 21:7 (1983).

Osborn, Mountain Fuel and *Grigsby* should be given only *stare decisis* effect in this case. The narrow holding in each of those cases was that the private party there failed to demonstrate that there was not substantial evidence in the administrative record to support the agency's decisions. Inexco does not seek reversal of those narrow holdings. Rather, by using evidence and legal argument not contained in the administrative records of those prior proceedings, Inexco seeks the opportunity to demonstrate that the substantial evidence in its own administrative record does not support the same interpretation that had been upheld in the earlier proceedings on the basis of less complete administrative records.

Respondents' suggestion that TECA's decision does not abuse the doctrine of *res judicata* is belied by Respondents' statement that TECA's mandamus ruling "was an appropriate means of *enforcing* [TECA's] prior rulings" in *Osborn, Mountain Fuel* and *Grigsby*. DOE Mem. at 6 (emphasis added). The reviewing court's role in this case is to *decide* this case, not to "enforce" prior decisions against one who was neither a party nor a privy to the prior proceedings.

Second, TECA's decision below improperly precludes Inexco from having a meaningful opportunity (a) to test the completeness of the administrative record presented to the court for review and (b) to contest DOE's *application* of its previously adopted interpretation to the unique evidence that was before the agency in Inexco's case. Respondents blithely assert

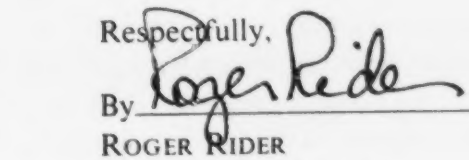
that TECA's "decision simply requires the district court to resolve petitioner's claims on the basis of the administrative record." DOE Mem. at 7. DOE refused to provide the requested information to Inexco during the administrative proceedings. By its decision, TECA has sanctioned DOE's efforts to preclude Inexco from having an opportunity to create a full and fair administrative record. The district court, on the other hand, properly recognized that a reviewing court is not bound by an incomplete record, but may permit supplementation as necessary to ensure plaintiff the opportunity of having meaningful judicial review of a full and complete administrative record. Pet. App. B-21. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-21 (1971) ("the bare record may not disclose the factors that were considered"); *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) (court may consider evidence that clarifies and explains the administrative record); *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1158-60 (9th Cir. 1980) (reviewing court not "straight jacketed" to the compilation of documents forwarded to it by the agency under the guise of the "administrative record," but may consider evidence indicating that the agency failed to consider relevant factors); *Exxon Corp. v. DOE*, 91 F.R.D. 26, 32-36, 40 (N.D. Tex. 1981) (court may permit discovery and presentation of evidence of, among other things, contemporanous construction of a regulatory term).

The documents requested by Inexco are logically probative not only of the proper interpretation of the term "posted price," but also of the proper *application* of that term to particular circumstances, such as those set forth in the administrative record in this case. Although TECA did not separately address the issue below, Respondents concede that the application question remains in the case. DOE Mem. at 6. Accordingly, even if the requested documents were not relevant to the interpretation question, the documents still would be relevant to the equally important question of the proper application to Inexco. On this relevance point TECA and Respondents have remained curiously silent.

III. Conclusion

The petition for a writ of certiorari should be granted.

Respectfully,

By 

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CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served with a copy of the foregoing document have been served. A copy of the foregoing document was mailed postage prepaid by first class mail to each of the following:

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The Honorable Clarence A. Brimmer
Chief Judge of the United States District
Court for the District of Wyoming
P.O. Box 985
Cheyenne, Wyoming 82001

ROGER RIDER